Supreme Court, U.S.
FILED
AUG 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-261

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

BINLADEN BSB LANDSCAPING,

Petitioner,

—against—

M.V. "NEDLLOYD ROTTERDAM", her engines, boilers, etc., NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN E. CONE, JR.
Counsel of Record

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Petitioners
14 Wall Street
New York, New York 10005
(212) 732-4646

Of Counsel

HELEN M. BENZIE
VINCENT L. LEIBELL, JR.
WILLIAM R. CONNOR III

Questions Presented

1. When the contents of a marine cargo container ("container") supplied by an ocean carrier are disclosed on the face of the bill of lading issued by the ocean carrier, under the United States Carriage of Goods by Sea Act of 1936 ("COGSA"), 46 U.S.C. §1304(3) and (4), can the ocean carrier claim its container was the COGSA package rather than the contents as disclosed on the face of the bill of lading?

2. Did the Court of Appeals err in holding that, despite the potting, wrapping, tying and/or separating of the plants in each container, the individual plants prepared for shipment were not packages under 46 U.S.C. §1304(5)?

3. Can a carrier owned and supplied container which is admittedly not "goods" under 46 U.S.C. §1301 and under Nedlloyd's bill of lading ever be a COGSA package?

TABLE OF CONTENTS

	PAGE
QUESTIONS INVOLVED	i
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
CORPORATE DISCLOSURE	1n
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
A. The Second Circuit Court of Appeal's decision conflicts with the findings of this Court with respect to containerization as well as with other holdings of the Second, and with holdings of the Fifth, Ninth and Eleventh Circuits	6
B. The appellate court has retroactively misapplied its prospective rule that words indicating packaging must be set forth on a bill of lading despite its express statement to the contrary by remanding the case for determination of the customary freight unit	20
C. The Second Circuit Court of Appeals failed to analyze COGSA as mandated by this Court	23
CONCLUSION	25
APPENDIX:	
Opinion of the Court of Appeals	1a
Opinion of the District Court	21a
Order Denying Petition for Rehearing	20a
Statute — Carriage of Goods by Sea Act	30a

TABLE OF AUTHORITIES

Cases:

Allied International American Eagle Trading Corp. v. *S.S. "YANG MING"*, 672 F.2d 1055 (2d Cir. 1982) 18

Allstate Ins. Co. v. *Inversiones Navieras Imparca*, 646 F.2d 169 (5th Cir. 1981) 18

Allstate Insurance Company v. *International Shipping Corp.*, 703 F. 2d 497 (11th Cir. 1983)..... 19, 20, 23

Aluminos Pozuelo Ltd. v. *Navigator*, 407 F. 2d 152 (2d Cir. 1968) 9, 18

American Trucking Assn. Inc. v. *NLRB*, 734 F.2d 966 (4th Cir. 1984) *aff'd* 45 CCH. S. Ct. Bull. P. B4300 (1985) 7

Associated Metals & Minerals Corp. v. *A/S D/S Svenborg*, 1984 AMC 376 (SDNY 1983), *aff'd, mem.* 738 F. 2d 418 (2d Cir. 1984) 10

Bruhn's Freezer Meats v. *United States Department of Agriculture*, 438 F.2d 1332 (8th Cir. 1971) 24

Cabot Corp. v. *S.S. Mormacscan*, 441 F. 2d 476 (2d Cir. 1971) 14

CTI-Container Leasing v. *Oceanic Operations*, 682 F. 2d 377 (2d Cir. 1982) 12

Encyclopaedia Britannica v. *S.S. Hong Kong Producer*, 42 F.2d 7 (2d Cir. 1969), *cert. denied*, 397 U.S. 964 (1970) 14, 19

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 23

Hartford Fire Insurance Co. v. *Pacific Far East Lines Inc.*, 491 F.2d 960 (9th Cir. 1974) 8, 18, 19, 24

Integrated Container Service Inc. v. *Starlines Container Shipping Ltd.*, 476 F. Supp. 119 (S.D.N.Y. 1979) ... 13

Leather's Best, Inc. v. *Mormaclynx*, 451 F.2d 800 (2d Cir. 1971) 7, 10, 11, 17, 18, 19

Malat v. *Riddell*, 383 U.S. 569 (1966) 24

Matsushita Elec. Corp. v. *S.S. Aegis Spirit*, 414 F. Supp. 894, (W.D., Washington 1976) 16, 18, 19

Mitsui & Co., Ltd. v. *American Export Lines*, 636 F. 2d 807 (2d Cir. 1981) 7, 8, 11, 14, 17, 18, 19, 24

Nichimen Company v. *M.V. FARLAND*, 462 F.2d 319 (2d Cir. 1971) 24

Northeast Marine Terminal Co. v. *Caputo*, 432 U.S. 249 (1977) 6, 12, 19

Packard Motor Car Co. v. *N.L.R.B.*, 330 U.S. 485 (1947) 23

Royal Typewriter Co. v. *M/V Kulmerland*, 483 F. 2d 645 (2d Cir. 1973) 7, 17, 18

Shinko Boeki, Co. v. *SS "Pioneer Moon,"* 507 F.2d 342 (2d Cir. 1974) 15, 17, 18

Smythgreyhound v. *M/V Eurygenes*, 666 F. 2d 746 (2d Cir. 1981) 7, 11, 17, 18, 22

Sperry Rand Corp. v. *Norddeutscher Lloyd*, n.o.r. 1973 A.M.C. 1392 (S.D.N.Y. 1973) 10, 19

Tor Line Aktiebolag v. *Folksam Omsesedig Sakforsakring*, XV European Transport Law 1980, 23 11

Transamerica ICS Inc. v. *M/V PanAtlantic* 1984 A.M.C. 489 (S.D. Fla. 1983) 13

United States v. *Oregon*, 366 U.S. 643 (1961) 23

Vegas v. *Compania de Navegacion*, 720 F.2d 629 (11th Cir. 1983) 19

Statutes and Rules:

United States Carriage of Goods by Sea Act, 46 U.S.C. 1300, *et seq.* 1
Section 1301 ..... i, 2, 16
Section 1301(c)(d) 13
Section 1303 14
Section 1304 3
Section 1304(3) i
Section 1304(4) i
Section 1304(5) ..... *passim*
Section 1311 23

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* 6

46 U.S.C. §13 i

F.R.C.P. Rule 9(h) 2

Pomerene Act, 46 U.S.C. §§81-122 8

49 CFR §420.3 12

Harter Act, 46 U.S.C. §190, *et seq.* 23

Other Authorities:

Bannister, *Containerization and Marine Insurance,* 5 J. Mar. L. & Com. 463, 476 (1973) 12, 13

1968 Brussels Protocol 10, 11

Gilmore and Black, *Law of Admiralty,* (2d ed. 1975) .. 15, 16

Simon, *Law of Shipping Containers,* 5 JML&C, 507 (1974) 12

2A *Sutherland on Statutory Construction* §47.31 (4th ed. 1973) 24

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The order of the Court of Appeals for the Second Circuit, dated May 16, 1985, denying the Petition for Rehearing containing a suggestion that the action be reheard *in banc* of petitioner, Binladen BSB Landscaping* ("Binladen"), is set forth in the Appendix at page 20a.** The decision of the Court of Appeals for the Second Circuit, dated April 3, 1985, reported at 759 F. 2d 1006, reversing the judgment of the United States District Court for the Southern District of New York, and remanding the case for further proceedings is set forth at App. 1a-20a. The opinion of the United States District Court for the Southern District of New York, dated June 25, 1984, entering judgment against respondent Nedlloyd Lijnen B.V. ("Nedlloyd") is reported at 593 F. Supp. 546, and set forth at App. 21a-29a.

Jurisdiction

Petitioner seeks review of the decision of the Court of Appeals for the Second Circuit, dated April 3, 1985 which was denied rehearing May 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

The United States Carriage of Goods by Sea Act, 46 U.S.C. 1300 *et seq.* ("COGSA") is involved in this proceeding and set forth at App.30a *et seq.*

---

*Binladen BSB Landscaping is a Swiss Company, Appendix 2a, part of the Binladen Organization.

**All references to "App" are to the Appendix.

Statement of the Case

Binladen brought this action against Nedlloyd to recover $80,322.00, the value of 10,426 live plants stowed in two Nedlloyd-supplied refrigerated containers, together with the ocean freight for transportation from Texas and Florida to Saudi Arabia. The action was begun on February 19, 1982 under the admiralty and maritime jurisdiction of the United States District Court for the Southern District of New York pursuant to Rule 9 (h) of the Federal Rules of Civil Procedure. When Binladen received them, the plants were dead.

The action was tried without a jury before the Honorable Abraham D. Sofaer, who rendered a decision on June 25, 1984. The District Court found that Nedlloyd's failure to properly inspect the malfunctioning container before the voyage, plus its failure to promptly connect the refrigerated containers to electricity, most probably caused the loss in the amount of $80,322.00 and that liability was not limited to $500 per container.

Conceding its liability for the loss, Nedlloyd appealed the District Court's finding that its liability was not limited to $500 per container.

In an opinion dated April 3, 1985, the Second Circuit Court of Appeals reversed the District Court's finding that liability was not limited to $500 per container and remanded the case for determination of the customary freight unit. On May 16, 1985, a petition for rehearing *in banc* was denied.

This petition invokes the interpretation of two sections of COGSA, pertinent parts of which are quoted below:

> §1301. Definitions
>
> When used in this chapter —
>
> . . . . . .
>
> (c) The term "goods" includes goods, wares, merchandise and articles of every kind whatsoever, except live animals

and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

§1304. Rights and immunities of carrier and ship.

. . . . . .

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

On or about June 10, 1980, Binladen bought various quantities of plants from Botanical Gardens in Perrine, Florida and Garden World in Laredo, Texas. These plants were ultimately transported in two refrigerated containers by Nedlloyd on the M.V. "Nedlloyd Rotterdam," a fully containerized vessel, from Houston, Texas and Miami, Florida as part of a larger consignment of such plants to Jeddah, Saudi Arabia. (App. 2a-3a, 21a-22a).

Each of the refrigerated containers involved was supplied and delivered by Nedlloyd to the suppliers, Botanical Gardens and Garden World. (App. 2a).

The plants supplied by Garden World of Laredo, Texas were the first given to Nedlloyd. These plants, with the exception of orchids which were placed in boxes, were cuttings and bare root cacti plants that were not in any soil or potting mix. These plants were to be shipped from Laredo, Texas via the Port of Houston

to Jeddah in Nedlloyd container No. ITLU 7200736. A temperature setting of 78° for the entire transportation, had been selected by the supplier. This setting had been used on many occasions for shipping similar plants under similar circumstances in refrigerated containers without the experience of any problems. The principal reason for setting the container temperature at 78° was to maintain an adequate flow of dehumidified air to these desert plants which could not withstand extended periods of high humidity or low temperatures.

At the time of its delivery to Garden World, the refrigeration unit on container No. ITLU7200736 was inoperative. Garden World called Nedlloyd's agent in Houston, which arranged for repair of the refrigeration unit on the container. These repairs consisted of the replacement of a fuse and the addition of freon. On June 9, 1980, one day after the subject container had been delivered to Garden World at Laredo, the plants were loaded into the container by the supplier.

Before loading, each of the plants had been inspected by governmental authorities and found to be in good condition and free from disease. Additionally, the larger plants, depending upon whether they had roots or tops, such as yuccas, were wrapped and were stacked in wood-pile style to allow for adequate ventilation. Cardboard separators were inserted between the various plants in accordance with customary practice.

Container ITLU7200736 was then transported to Houston and delivered to Nedlloyd's terminal on June 10, 1980. At this terminal, Nedlloyd's agent issued an equipment, condition and inspection report which indicated that this container was again found to be malfunctioning, necessitating the addition of more freon and the tightening of a sightglass. Despite the fact that this container was received by Nedlloyd at its Houston facility at 4:13 p.m. on June 10, 1980, it was not hooked up to electricity and put on the ship, according to the applicable partlow chart, until 5:00 a.m. on June 11, 1980. Partlow charts are supposedly

contemporaneous records of the functioning of the container refrigeration unit.

On June 13, 1980, Nedlloyd container SCXU488906 was delivered to Botanical Gardens, the other supplier in Perrine, Florida. Prior to the loading, each of the Florida plants was inspected by governmental authorities and was found to be free of infection or infestation. On June 13, 1980, the plants were loaded into container SCXU488906 by Botanical Gardens.

The Botanical Gardens plants were individually potted and packed in container SCXU488906, using the "California stagging" method, the customary and proper method of stowing plants with foliage in a refrigerated container.

Prior to loading, these plants were watered and the soil in the pots was sprayed to prevent insects and fungus disease. According to Nedlloyd's dock receipt, container SCXU488906 was delivered to Nedlloyd's Miami terminal on June 13, 1980, at 5:00 p.m. According to Nedlloyd's bill of lading, RC-2, this container was loaded on board the "NEDLLOYD ROTTERDAM" on June 14, 1980. This container was not hooked up to electricity, however, until June 16, 1980 at 6:00 a.m., some 61 hours after its receipt by Nedlloyd on the pier, a period of hot temperatures in Miami.

The entire Botanical Gardens shipment, transported by Nedlloyd, consisted of five refrigerated container loads of similar plants, all consigned to Binladen. All of these refrigerated containers were set at 58°F—a temperature supplied to Nedlloyd by Botanical Gardens. Previously, this supplier had sent 60 other refrigerated containers with similar plants at similar temperature settings, to Jeddah, without any problem.

REASONS FOR GRANTING THE WRIT

A. The Second Circuit Court of Appeal's decision conflicts with the findings of this Court with respect to containerization as well as with other holdings of the Second, and with holdings of the Fifth, Ninth and Eleventh Circuits.

Ocean carriers have made significant strides to modernize and simplify their vessels and cargo handling operations by the use of containers specially designed for carrying cargo on seagoing vessels. In *Northeast Marine Terminal Co. Inc.* v. *Caputo,* 432 U.S. 249 (1977), this Court held that stevedores loading and unloading cargo into containers were covered by the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. §901, *et seq.* This Court specifically found that:

> Unlike traditional break-bulk cargo handling in which each item of cargo must be handled separately and stored individually in the hold of a ship as it waits in port, containerization permits the time-consuming work of stowage and unstowage to be performed on land in the absence of the vessel. The use of containerized ships has reduced the costly time the vessel must be in port and the amount of manpower required to get the cargo to the vessel. In effect, the operation of loading and unloading has been moved shoreward; *the container is a modern substitute for the hold of the vessel.* As Judge Friendly observed below, '[S]tripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds.' *Pittston Stevedoring Corp.* v. *Dellaventura,* 554 F. 2d 35, 53 (CA2 1976). *Caputo, supra,* 270-271. (emphasis added).

How can a modern substitute for the hold of a vessel be a package?

These containers are used primarily for the convenience of the ocean carrier since they appreciably reduce cargo handling time and vessel port time. *Leather's Best* v. *Mormaclynx*, 451 F. 2d 800, 816, n. 19 (2d Cir. 1971). *See also, American Trucking Assn. Inc.* v. *NLRB*, 734 F. 2d 966, 968-969 (4th Cir. 1984) *aff'd* ____ U.S. ____, 45 CCH. S. Ct. Bull. P. B4300 (1985).

In the instant case, the Court of Appeals properly recognized that a container is functionally part of a ship and to classify it as a package would contravene the purpose of COGSA, 46 U.S.C. §1304(5). Opinion, App. 10a-11a. In *Mitsui & Co., Ltd.* v. *American Export Lines*, 636 F. 2d 807 (2d Cir. 1981) and *Smythgreyhound* v. *M/V "EURYGENES"*, 666 F. 2d 746 (2d Cir. 1981), the Second Circuit declared that where the contents of a container are disclosed on the bill of lading then the container is not the COGSA package. Further, in *Smythgreyhound, supra*, the Second Circuit said that:

> [We] hold today that in the absence of clear and unambiguous language indicating agreement on the definition of 'package' then we will conclusively presume that the container is not the package where the bill of lading discloses the container contents. *Smythgreyhound, supra*, 753 n. 20.

The Second Circuit, in this case, has stated a prospective rule that containerized goods must be described as individually packaged on a bill of lading regardless of their actual packaging in the container to escape the COGSA package limitation. Opinion, App. 16a.

In *Mitsui, supra*, the Second Circuit in an effort to inject common sense into the limitation question, rejected the functional economics test set forth in *Royal Typewriter Co.* v. *M/V Kulmerland*, 483 F. 2d 645, (2d Cir. 1973) and its analysis of the sufficiency of the packaging of the goods stowed in a container.

Now it seems the Court is imposing a magic word test. If the goods in a container are described as "packages", regardless of

their actual preparation for transportation, then the number of packages described will be considered COGSA packages. This will engender misrepresentations on bills of lading under the Pomerene Act, 46 U.S.C. §81-122, and a return to a *Kulmerland* type analysis of whether the words used to describe the packaging sufficiently indicate packaging.

In *Mitsui, supra,* 821, the Second Circuit expressly adopted the dictionary definition of package contained in *Hartford Fire Insurance Co.* v. *Pacific Far East Line Inc.*, 491 F.2d 960, 963 (9th Cir.) *cert. denied,* 419 U.S. 873 (1974). In *Hartford,* the Ninth Circuit adopted the dictionary definition of package as

> a small or moderate sized pack: bundle, parcel . . . a commodity in its container . . . a covering wrapper or container . . . a commodity. The word 'package' is defined in Black's Law Dictionary 1262 (rev. 4th ed. 1968) as: 'a bundle put up for transportation or commercial handling; a thing in form to become, as such, an *article of merchandise or delivery from hand to hand* . . . As ordinarily understood in the commercial world, it means a shipping package. *Id.* at 963. (emphasis supplied)

Certainly, the wrapped rolls of floor covering in *Mitsui* were articles of merchandise. The potted plants in the Miami container in question were articles of merchandise, as were the tied and wrapped plants in the Houston container. The decision in the instant case squarely conflicts with the definition of package in *Hartford* as adopted in *Mitsui.*

In *Mitsui,* the Second Circuit only required disclosure of the number of packages or units. *Mitsui, supra,* 821 n. 18. The COGSA limitation can be applied to the individual plants stowed in the container on two bases. First, using the *Hartford* definition, each plant fits into the concept of package since each is an article of merchandise enumerated as such on the bill of lading. Secondly, under *Mitsui,* disclosure of the contents of a container in terms of packages or units is required. In the instant case the

number of individual units, i.e., of plants, in each container was disclosed on each bill of lading. The Second Circuit's pre-*Mitsui* criteria of what is a package enunciated in *Aluminos Pozuelo Ltd.* v. *Navigator,* 407 F. 2d 152, 155 (2d Cir. 1968), defines a package as a class of cargo to which

> . . . some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods.

Applying this standard to the plants involved, each potted, wrapped or tied plant is a package.

Nedlloyd has asserted that the COGSA limitation applies, due to a fine print U.S.A. Clause in its bill of lading invoking the benefits of COGSA. The bill of lading also contains Clause 6 which provides:

> 6. THE AMOUNT OF COMPENSATION
>
> (3) Compensation shall not however exceed U.S. $2 per kilo of gross weight of the goods lost or damaged. (Second Circuit, Joint Appendix, A247).

Since Nedlloyd purports to limit its liability on the basis of a weight calculation—something that is not provided for in 46 USC §1304(5)—it is plaintiff's contention that Nedlloyd has chosen to define a kilo as being the customary freight unit regardless of the basis used to calculate the freight. Interestingly, Nedlloyd failed to adduce any testimony concerning the weight of any of the Texas plants separated by cardboard, even though its limitation, which would ordinarily be per package or per customary freight unit, is claimed by it to be per kilo.

If bills of lading are to be construed most strongly against whoever drafted the clause in question, then the limitation of liability clauses on the Nedlloyd bill of lading should be construed most strongly against Nedlloyd and the limitation of $2 per kilo of weight under Clause 6, which would be more than the COGSA

limit in this case, should be applied. *Associated Metals & Minerals Corp.* v. *A/S D/S Svenborg*, 1984 AMC 376 (SDNY 1983), *aff'd, mem.* 738 F. 2d 418 (2d Cir. 1984).

The appellate court in the instant case relies heavily on Judge Lumbard's opinion in *Sperry Rand Corp.* v. *Norddeutscher Lloyd*, n.o.r., 1973 A.M.C. 1392 (S.D.N.Y. 1973), for the proposition that the container becomes the "package" where the items within the container are not described on the bill of lading as being packaged. Judge Lumbard's decision is clearly distinguishable and recognizes that *carrier supplied containers are different than shipper supplied crates or boxes.* In *Sperry Rand, supra,* the "container" was not a 20′ or 40′ × 8′ × 8′ reusable, marine cargo container. It was a shipper-supplied and shipper-owned 8′ × 5′ × 6′ unit—probably a large box or crate-like device. At any rate, Judge Lumbard stated:

> In addition, the container here was procured by the shipper and was used by the shipper without any involvement of the carrier. Finally, the size of the container here is much closer to the pallets involved in *Standard Electrica,* approximately three feet by three feet by three feet, than the huge container considered in *Leather's Best.* . . . *Id.*, 1398-1399.

The analogy to *Sperry Rand* fails because technologically there is no comparison between the crate and the marine cargo container in the instant case.

Each of the containers shipped to Binladen was a 40′ container similar to the containers used in *Leather's Best, supra.*

The only other support given by the Second Circuit in the instant case for its new rule is the *1968 Brussels Protocol,* which clearly does not support its conclusion. The *Brussels Protocol,* in relevant part, provides:

Article 2

(c) Where a container, pallet or similar article of trans-

> port is used to consolidate goods, the number of *packages or units* enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. (Emphasis ours).

The Brussels Protocol, which is not U.S. law, clearly sets forth the same basic rule previously enunciated by the Second Circuit in *Leather's Best, supra, Mitsui, supra,* and *Smythgreyhound, supra:* that if the number of packages or units is disclosed on the bill of lading, each of these packages or units, is to be the "package" and not the article of transport (the container). In *Tor Line Aktiebolag* v. *Folksam Omsesedig Sakforsakring,* XV European Transport Law 1980, 23, the Supreme Court of Sweden, in February 1977, held under the Swedish equivalent of 46 U.S.C. § 1304(5) that since the number of vessels, utensils, in a container was specified on the bill of lading each vessel should be regarded as one unit of goods and applied the limitation to each unit. *See also* 16JML & C, 284 (1985).

The appellate court in the instant matter indicated that disclosure of contents, (packages or units), was the law of the Circuit before April 3, 1985, when it stated:

> We recognize that the rule established by us today, which will henceforth limit a carrier's liability under the same circumstances to $500 per container, resolves an uncertainty noted in earlier decisions (e.g., *Mitsui* and *Smythgreyhound*) and that, in view of this uncertainty, the parties might have reasonably believed that the description of the number of plants on the bills of lading was sufficient to bring the shipment within the *Smythgreyhound* decision to the effect that a container whose contents are disclosed (there, however, in terms of packages) should not itself be treated as a package.[11] Accordingly, the rule we announce

> will not be applied retroactively but prospectively to bills of lading prepared after the date of this decision. *Opinion*, App. 16a-17a.

The former law, which looked to whether the contents—packages or units—were disclosed on the bill of lading, has now been abandoned by the instant decision.

If this were a criminal matter, the Court would have no difficulty in finding the Second Circuit's action to be an *ex post facto* law and unconstitutional. The Admiralty jurisdiction of the federal court is equitable. Is it equitable to recognize a party complied with prior law, announce a prospective rule, then proscribe the previous compliance with the prior rule? We submit it is not.

A simple, not complex, rule should be the hallmark of construing COGSA §1304(5). Such a rule would consider not only what is a package and what is a container but also the legislative objective of enacting COGSA §1304(5).

As Judge Kearse aptly recognized, containerization completely changed the fundamental nature of the way large shipments of individual units and/or packages are to be stowed, handled and transported. *CTI-Container Leasing* v. *Oceanic Operations*, 682 F. 2d 377 (2d Cir. 1982). In *CTI-Container Leasing, supra*, this Court cited the Supreme Court holding in *Caputo*, supra, which set forth the basis upon which containers have been *consistently* characterized as nothing other than modern substitutes for the hold of a vessel and functional parts of a ship. There is no confusion in the shipping industry concerning the obvious difference between a huge carrier-owned container and a COGSA "package". While a container is a permanent structure specifically designed to be reusable for many years for the carriage of multiple units or packages, a "package" is a wrapping or enclosure specifically *bound* to the goods and is not normally reusable but is destroyed after its purpose has been accomplished, 49 CFR §420.3, Simon, *Law of Shipping Containers*, 5 JML&C, 507, 514-515 (1974). Bannister, *Containerization* and *Marine*

Insurance, 5 J. Mar. L. & Com. 463, 476 (1973). A "package" is not supplied by steamship company but is *bound* to the goods by the manufacturer, shipper or freight forwarder, and is usually used for a single voyage. Unlike a container, which is never bound to the goods, must be returned to the carrier, and which is reusable at the will of the ocean carrier, ownership of a "package" is invariably transferred to the buyers of the goods to which it is *bound*. On the other hand, the purpose of a carrier container is to facilitate the loading, handling, stowage, discharge, delivery, stevedoring and inland movement of the cargo which is placed in it and the operation of containerized vessels for which containers are necessaries. *Integrated Container Service Inc.* v. *Starlines Container Shipping Ltd.*, 476 F. Supp. 119 (S.D.N.Y. 1979), *Transamerica ICS Inc.* v. *M/V PanAtlantic*, 1984 AMC 489 (S.D. Fla. 1983). Such a container obviously benefits the carrier. While some have argued that the shipper or cargo owner also benefits from containerization, this claim is, at best, dubious.

Is the semantic test one that Congress in 1936 envisioned or was the test strictly to be the common-sense approach of whether the item actually shipped is or is not a "package"? Congress in enacting COGSA §1304(5), was only concerned with the goods (cargo) being shipped and not with ship's appurtenances and gear. This is apparent in the very name of the act itself. The container is not being shipped. The cargo is being shipped. The items of *cargo not the container should be the criterion for determining what is a COGSA "package"*. COGSA defines "goods" as "goods, wares, merchandise and articles of every kind whatsoever. . . ." 46 U.S.C. § 1301(c).

COGSA defines "ship" as: "any vessel used for the carriage of goods by sea." 46 U.S.C. § 1301(d).

The COGSA package limitation sets a limit for the carrier's liability with respect to "the transportation of goods" [COGSA §1304(5)] not with respect to the ship or any of its functional parts used to hold the goods.

The appellate court, through its new rule, will not avoid the pains of the fundamental question of whether an item is packaged, but instead will be forced time and time again to interpret the meaning of various words and whether each of these signifies a COGSA "package". We have seen the confusion in the *Mitsui, supra,* opinion where footnote 18 is in opposition with the body of the opinion. The *Mitsui* opinion itself clearly indicates that the rolls were not described in the bill of lading as packages although actually prepared for shipment, but the result was that each roll was a COGSA "package." Footnote 18 in *Mitsui, supra,* is:

> 18. Nothing said here, of course, covers the situation in which the bill of lading does not show how many separate packages or units there are. *Id.*, 821.

Yet, on the very same page (page 821), the *Mitsui* Court stated: "While the raw rolls of floor covering would not themselves have been packages, . . ." and applied package limitation to each roll because each had been in some way prepared for shipment. The bill of lading described the rolls without any reference to packing. Is the Panel permitting a carrier by the use of its language on its bill of lading form to determine whether the container will be considered a package? If so, the appellate court is in clear disagreement with the prior holdings of the Second Circuit that a bill of lading is a contract of adhesion to be strictly construed against the carrier especially with regard to the boiler plate language of the form itself. *Encyclopaedia Britannica, Inc.* v. *S.S. Hong Kong Producer,* 42 F. 2d 7, 15 (2d Cir. 1969) and *Cabot Corp.* v. *S.S. Mormacscan,* 441 F. 2d 476, 478 (2d Cir. 1971). Are cargo owners now at the mercy of whether the column on the bill of lading says, "Package", "Piece" or "Item"? It is submitted that any such result violates COGSA.

46 U.S.C. § 1303, only requires that a bill of lading be furnished by a carrier identifying the number of *packages or pieces* or quantity or weight. The only requirement in COGSA that the *nature* of the goods be disclosed is that provided in Sec. 1304

(5) where a *declaration of value* may be made. Had Congress intended the shipper be required to state the nature and packaging of the goods to avoid the $500 package limitation, this would have been expressly incorporated in COGSA. The appellate court in this case has attempted to reduce the minimum floor of the carrier's liability and thus has legislated.

A container cannot simultaneously be a "package" and ship's gear anymore than the hold of a vessel can be. See *Shinko Boeki, Co.* v. *SS "Pioneer Moon,"* 507 F. 2d 342, 345 (2d Cir. 1974). This is especially true since carriers, more often than not, insist upon the use of their containers.

It is inconsistent to describe containers as "packages", and practically exonerate carriers from meaningful liability because they insist on using modern ships' gear containers for the avowed purpose of transporting hundreds of individual packages. This is especially true in light of the fact that exorbitant charges for attempting to declare a value for carriage (here Nedlloyd's charge is 10% of the declared value of the shipment, plus the ocean freight—a charge which greatly exceeds all risk cargo insurance), have made it practically impossible for shippers to declare values for carriage. Additionally, paragraph 6(4) of Nedlloyd's bill of lading invalidly requires Nedlloyd's own consent before a higher value can be declared. The stated purpose of COGSA §1304(5), is to insure that a negotiable bill of lading gives certain guaranteed, irreducible rights to cargo which may be enforced against carriers by prohibiting them from escaping liability through nominal package limitations. As Professors Gilmore and Black in *Law of Admiralty*, (1975) stated:

> COGSA allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities and never in the direction of diminishing them. This apparent one sidedness is a common-sense recognition of the inequality in bargaining power which both Harter and COGSA were designed to redress, and of the fact that one

> of the great objectives of both Acts is to prevent the impairment of the value and negotiability of the ocean bill of lading. *Id.*, 125, 126.

It is no answer to argue that a shipper should "describe" the packaging on the bill of lading not only because this is not required by COGSA but also the COGSA test is quite clearly an objective one—whether "goods, wares and articles of every kind whatsoever" (Sec. 1301) are packages or not. Printed bill of lading forms, such as those used in the instant case, are deliberately contrived survivors of the pre-containerization era when only *one* grouping of numbers was used. Since containerization, as carriers well know, every containerized shipment involves *two* numbers—one for the number of items being shipped, and the other for the number of containers involved. Despite this fact, these bill of lading forms continue to provide a single column for the insertion of one group of numbers. Sometimes, the column is headed "No. of Packages", more often "Number of Packages, Pieces or Containers." Invariably, these columns are far too small for the insertion of descriptive language concerning packaging. As Judge Beeks said in *Matsushita Elec. Corp.* v. *S.S. Aegis Spirit*, 414 F. Supp. 894 (W.D., Washington 1976), at page 905:

> If carriers alone, or even carriers and shippers together, are allowed to christen something a 'package' which distorts or belies the plain meaning of this word as used in the statute, then the liability floor becomes illusory and negotiable. The package limitation provision serves no purpose whatsoever if the courts' function in applying it is to merely identify and uphold the parties' private definition of COGSA package. Of course, the parties' characterization may often be wholly reasonable and consistent with the language and purpose of the statute, but the point to be made is that it is not the parties' characterization of the shipment, but the court's interpretation of the statue, that controls. *Id.*, 904-905.

The correctness of the Second Circuit's decision in *Smythgreyhound, supra,* 748 is amply supported:

> In *Mitsui* this court, after reviewing the Congressional policy reflected in section 4(5) of COGSA and the rationale of *Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F. 2d 800 (2d Cir. 1971), as well as the problems with the 'functional exonomics' test of *Kulmerland,* held that 'generally a container supplied by the carrier is not a COGSA package if its contents and the number of packages or units are disclosed [in the bill of lading]. . . .' 636 F. 2d at 821. Judge Oakes, the author of *Kulmerland and Cameco, Inc.* v. *S.S. American Legion,* 514 F. 2d 1291 (2d Cir. 1974), concurred in Mitsui saying: '[i]n the realm of container shipping, *where the bill of lading specifies the contents, the ship's container should not be deemed a package—even presumptively only—irrespective of how the goods* within it *are packed.*' 636 F. 2d at 825. (Emphasis Ours.)

There is no uniformity among or within the Circuits in deciding what is a package under 46 U.S.C. § 1304 (5).

The Second Circuit held in *Leather's Best, supra,* that a container carrying hides was an extension of the vessel's hold and not a package under 46 U.S.C. § 1304 (5). In *Kulmerland, supra,* the appellate court held that a container which carried cartons of adding machines was a COGSA package because its contents, the boxed adding machines, did not meet the functional economics test of being export packages. In *Shinko Boeki, supra,* a carrier supplied specially designed lift-on lift-off tanks to carry liquid latex. The Second Circuit held that shipment in these tanks was closer to shipment in the vessel's deep tanks than in the shipper's drums and that the tanks were not COGSA packages. The *Shinko Boeki* court distinguished *Kulmerland* on the basis that there was no disclosure of the weight or number of the contents of the *Kulmerland* container and the functional economics test was inappropriate for bulk cargoes. *Shinko Boeki,*

supra, 345. In *Mitsui, supra,* the Second Circuit discarded the *Kulmerland* package sufficiency inquiry and said as long as the contents were disclosed, the container would not be the package. This holding was reaffirmed in *Smythgreyhound, supra,* when the Second Circuit held that the COGSA package limitation should be applied to the disclosed contents of the container. In *Allied International American Eagle Trading Corp.* v. *S.S. "YANG MING"*, 672 F.2d 1055 (2d Cir. 1982), the question was whether the number of pallets or the number of things on each pallet were COGSA packages. The bill of lading had typed clearly across the bottom "Thirty (30) Packages Only". *Id.*, 1056. In holding the pallets were packages the Court relied on the parties intent as expressed in the bill of lading. Now in *Binladen* the Second Circuit is resurrecting *Kulmerland* while saying that the petitioners' arguments were accurate and reasonable under *Mitsui* and *Smythgreyhound.*

The container package problem is acerbated by the Second Circuit's definition of package. On one hand *Mitsui* seems to adopt the dictionary definition used in *Hartford.* On the other hand starting with *Aluminos, supra,* the Second Circuit has held that a package under 46 U.S.C. § 1304 (5) is something to which some packaging preparation for transportation has been made which facilitates handling. Under this scheme, a skid has made a toggle press a package yet according to the *Binladen* court a pot does not make a plant a package and a wrapping does not make a suit a package. *Aluminos, supra; Opinion,* App. 14a n. 10.

The Fifth Circuit in *Allstate Ins. Co.* v. *Inversiones Navieras Imparca,* 646 F.2d 169 (5th Cir. 1981) held the container was not the package when the bill of lading said "one 20 ft. container with 341 cartons" and "one 20′ container said to contain electrical equipment radio apparatus". The Fifth Circuit seems to have accepted the *Mitsui-Smythgreyhound* disclosure rule.

The Ninth Circuit in *Hartford Fire Ins. Co., supra,* took the common sense approach to packaging and containerization

advocated in *Leather's Best*. As noted by Judge Beeks in holding the container was not a package *S.S. AEGIS SPIRIT, supra.*

> . . . [T]echnological advancements, whether or not foreseeable by the COGSA promulgators, do not warrant a distortion or artificial construction of the statutory term "package". A ruling that these large reusable metal pieces of transport equipment qualify as COGSA packages—at least where as here, they were carrier owned and supplied—would amount to just such a distortion. *Id.*, 907

In *Hartford* the Ninth Circuit held a skidded generator was *not* a package where the generator was open to view, in marked contrast to the *Aluminos* case.

By totally disregarding the packaging condition of the *Binladen* plants in the containers, the *Binladen* court has abandoned the *Aluminos* packaging definition as well as that of *Mitsui-Hartford* and completely ignored the practical realities of ocean transportation so aptly described in *Encyclopedia Britannica, Mitsui* and *Caputo.*

The Second Circuit Court of Appeals' *Binladen* decision conflicts with the findings of this Court in *Caputo, supra,* that containers are extensions of a vessel's hold, the Ninth Circuit holding in *Hartford,* that a package is an article of merchandise and the Eleventh Circuit holdings that fine-print limitation clauses will not be enforced where, as here, the party to be charged had no actual notice of its provisions, in *Allstate Ins. Co.* v. *International Shipping Corp.*, 703 F. 2d 497 (11 Cir. 1983) and in *Vegas* v. *Compania de Navegacion,* 720 F.2d 629 (11th Cir. 1983), that the disclosed contents of an article of transport are the COGSA packages. In *Vegas,* applying *Mitsui,* the Eleventh Circuit reached the opposite result of the *Sperry Rand* Court Accordingly, this Court should grant certiorari to resolve the conflict over the interpretation of the word "package" in 46 U.S.C. 1304(5).

B. The appellate court has retroactively misapplied its prospective rule that words indicating packaging must be set forth on a bill of lading despite its express statement to the contrary by remanding the case for determination of the customary freight unit.

In its opinion, the Second Circuit now seems to indicate that some description of packaging, in advising the ocean carrier of the *nature* of a shipment within a container, must be placed on the bill of lading. If this is not done, the container itself will become the COGSA, §1304(5) "package" where the container is listed numerically under the carrier's printed form bill of lading column entitled "packages". After conceding, that this rule is ". . . established by us today, . . ." and is to be applied prospectively and ". . . will not be applied retroactively . . .", (App. 17a-18a) the appellate court, however, reached its decision that the plants within the containers were not packages by applying this new rule of law, when it stated:

> Applying the foregoing principles to the present case, although the bills of lading listed in the column entitled "No. of Pkgs." the number of containers shipped and revealed the total number of plants in the containers, they gave no indication whether or how the plants were packaged. (App. 11a-12a).

Further, this Court states:

> With respect to the present case, since the plants described on the bills of lading clearly are not packages, they will be deemed to be 'goods not shipped in packages' within the meaning of COGSA, which limits the carrier's liability in such a case to $500 per 'customary freight unit,' which is generally the unit on which the freight charge is based for the shipment at issue. (App. 18a).

In contrast, is footnote 7, at App. 13a, and the following statement in the Opinion; App. 13a.

> It is true that some of the plants were in fact prepared for shipment in ways that might have entitled them, if properly described in the bill of lading, to treatment as packages as defined in *Aluminios Pozuelo, Ltd.* v. *S.S. Navigator, supra.*

In relevant part §1304(5) of COGSA is as follows:

> (5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

It is obvious that the clear intent of Congress, in 1936, was that if an item was a "package," the carrier's liability was to be limited to $500. If an item was not a package, then the liability would be $500 per customary freight unit. Aside from the issue of whether Congress, in enacting COGSA, ever envisioned that a 40 foot steel container could be considered a "package", it seemed reasonably clear that this rule was a basic and fundamental one which envisioned a determination being made of *whether "goods, wares and articles of every kind whatsoever" are or are not packages.*

Prior to the instant opinion, it seemed clear that if the number of units or other items was disclosed on the face of the bill of lading, and if each of the items within the container was, in fact, packaged, the liability of the carrier would be limited to $500 for each of these packaged items or units. *Mitsui, supra,*

Smythgreyhound, supra. The Panel*** specifically recognized the previous law in its statements, and therefore, decided that this new rule would be applied *prospectively* only to bills of lading issued subsequent to April 3, 1985. (App. 17a-18a). However, in remanding for a finding of customary freight unit, this Court specifically found that, with the exception of non-packaged plants in the Houston container (see footnote 3, App. 5a), that each of the plants which may have been considered individual packages, i.e. those to which some "preparation" for shipment, pots or wrapping were added, were not in fact packages because they were not described as packaged on the bills of lading. Since they were not to be considered packages, the matter was remanded to determine the customary freight unit. *This is a direct retroactive application of the new rule.*

The Panel also erred in stating in footnote 9 (App. 14a) that Judge Sofaer's findings that the individual plants in the Houston container were packaged "cannot be sustained . . .". The Panel states that Judge Sofaer's findings cannot be sustained because the shipper did not specify how *many* of these plants were packaged. Firstly, Mr. Elsazsser's testimony was not taken to establish the packaging of the shipment. He made it clear that he viewed the shipment only after the shipment had rotted and decayed. Secondly, and most importantly, Mr. Ramirez, a non-interested party, specifically set forth the type, number and packaging of the plants within the Houston container, and this was available to Judge Sofaer as it was to the Panel. The Panel even sets forth the number, type and packaging taken from the testimony of Mr. Ramirez in its opinion. (App. 3a).

It should be noted that Container SCXU488906 completely failed to operate after discharge and that Binladen had paid for the *use of* properly functioning reefers from the moment the plants were to be in the containers until the moment the plants were removed therefrom. Aside from breach of warranty questions, the failure of Container SCXU488906 to function after

***Second Circuit, Court of Appeals.

discharge obviously either caused or contributed to be loss of the plants in that container.

Nedlloyd, in paragraph B of its bills of lading, purports, to extend all of COGSA to periods after discharge. In so doing, it extended, of necessity 46 U.S.C. § 1311, which expressly preserves the provisions of the Harter Act, 46 U.S.C. §190, *et seq.* The Harter Act fails to contain limitations of liability and therefore there could be no limitation with respect to the contents of this container. See the Eleventh Circuit's recent opinion in *Allstate Insurance Company, supra.*

It is obvious that the results reached before the *Binladen* opinion, differ considerably with the new rule and, therefore, petitioner should have been able to recover the full amount for all of the plants that were "packages", i.e. the potted Miami plants and the paper wrapped, tied, boxed and or separated Houston plants which had been prepared for transportation.

It is essential for the maritime industry as a whole and certainly for a full understanding of this Circuit's law, that this obvious and fundamental mistake appearing in its opinion, be rectified.

C. The Second Circuit Court of Appeals failed to analyze COGSA as mandated by this Court.

One of the factors to be considered in deciding an application for certiorari is whether the lower court has decided a federal question in a way in conflict with applicable decisions of this Court. S. Court Rule 17.1 (c).

When sufficiently clear in its context, the Court has held the language of a statute controls. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 492 (1947). In determining whether language is clear, words

are to be given their plain ordinary meaning if Congress ascribes no special or technical meaning to the words. *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966); *Bruhn's Freezer Meats* v. *United States Department of Agriculture*, 438 F.2d 1332, 1338 (8th Cir. 1971); 2A *Sutherland on Statutory Construction* §47.31 at 155-156 (4th ed. 1973).

Both the Ninth Circuit in *Hartford* and the Second Circuit in *Mitsui, supra*, 814, and *Nichimen Company* v. *M.V. FARLAND*, 462 F.2d 319, 334 (2d Cir. 1971) recognized this.

To assert, as the *Binladen* appellate court did, that an ocean carrier's container, an object which by no ordinary common-sense understanding of the term package could be construed to be a package, is a package is illogical. Nedlloyd itself does not consider containers to be packages. Paragraph 2 of the Conditions of Carriage in the Nedlloyd bill of lading form provides:

2. DEFINITIONS

. . .

"GOODS" means the cargo accepted from the Shipper and includes any container *not* supplied by or on behalf of the Carrier. (emphasis added, Second Circuit, Joint Appendix, A 247).

Impliedly if the carrier supplies the container as in the instant case it is not part of the goods and not to be considered a package.

COGSA deals with goods. To determine if goods are packages one must look at the goods that were shipped. If the actual goods are fitted for transportation and of a nature to be ordinarily considered packages, they should be considered packages under 46 U.S.C. § 1304(5).

As the Second Circuit noted the definition of package under 46 U.S.C. § 1304(5) has been a recurrent problem. *Mitsui, supra,*

App. 1a. The package definition question has generated considerable controversy and should be settled by implementing this Court's rules that the language of a statute and ordinary meaning of the words used therein govern.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the Second Circuit.

Respectfully submitted,

JOHN E. CONE, JR.
Counsel of Record

BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Petitioners
14 Wall Street
New York, New York 10005
(212) 732-4646

Of Counsel

HELEN M. BENZIE
VINCENT L. LEIBELL, JR.
WILLIAM R. CONNOR III

APPENDIX

Opinion of the Court of Appeals

BINLADEN BSB LANDSCAPING,

Plaintiff-Appellee,

—against—

M.V. "NEDLLOYD ROTTERDAM", her engines, boilers, etc., NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Defendant-Appellant.

No. 463, Docket 84-7710.

United States Court of Appeals,
Second Circuit.

Argued Dec. 3, 1984.

Decided April 3, 1985.

Landscaper, and shipper consignee, sued ocean carrier for loss of two refrigerated containers of live plants shipped from United States to Saudi Arabia. The United States District Court for the Southern District of New York, Abraham D. Sofaer, J., 593 F. Supp. 546, awarded damages in amount of $80,332 against carrier, and carrier appealed. The Court of Appeals, Mansfield, Circuit Judge, held that: (1) reference in bill of lading to number of plants did not qualify each plant as separate Carriage of Goods by Sea Act package; (2) plants would be deemed as "goods not shipped in packages" within meaning of Carriage of Goods by Sea Act limitation of liability provisions; and (3) deficiencies in bill of lading did not deprive carrier of benefit of Act's limitation of liability.

Reversed and remanded.

J. Scot Provan, New York City (Richard H. Sommer, Arthur E. Hoffmann, Jr., Esq., Kirlin, Campbell & Keating, New York City, of counsel), for defendant-appellant.

John E. Cone, Jr., New York City (William R. Connor III, Helen M. Benzie, Lawrence B. Brennan, Bigham Englar Jones & Houston, New York City, of counsel), for plaintiff-appellee.

Before MANSFIELD, OAKES and NEWMAN, Circuit Judges.

MANSFIELD, Circuit Judge:

We are once again called upon to interpret § 4(5) of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (1982) ("COGSA" or "the Act"), which limits the carrier's and ship's liability to "$500 per package . . . , or in case of goods not shipped in packages, per customary freight unit," unless the shipper explicitly declares a higher value. Appellant here, a Netherlands ocean carrier, appeals from a judgment of the Southern District of New York awarding $80,332.00 damages against it after a bench trial before Judge Abraham D. Sofaer, based on its role in the untimely death of more than 10,000 plants shipped overseas in two containers on board its ship, the M.V. "Nedlloyd Rotterdam." The district court applied the $500 "per package" limit of § 4(5). We hold instead that the plants were "goods not shipped in packages" within the meaning of the Act and accordingly reverse and remand the case for a determination of damages limited to $500 "per customary freight unit" used in shipments of this type.

In June 1980, appellee Binladen BSB Landscaping ("Binladen"), a Swiss company, contracted with appellant Nedlloyd Lijnen B.V. ("Nedlloyd") to ship ten refrigerated containers loaded with plants from two locations in the United States to Saudi Arabia, where the plants were to adorn the palace grounds of that country's crown prince, who is now its king. Binladen and its agents packed and filled the containers, which were delivered to Nedlloyd and loaded on the M.V. "Nedlloyd Rotterdam," a fully containerized vessel, for the journey. Although most of the

plants in eight of the ten containers arrived in Saudi Arabia intact and healthy, those within the remaining two containers were brittle and lifeless when opened and inspected by a Binladen employee in Jeddah.

In early 1982 Binladen brought a maritime action in the Southern District of New York for damages against Nedlloyd and against the M.V. "Nedlloyd Rotterdam."[1] Nedlloyd denied responsibility for the plants' death and also asserted an affirmative defense based on the limited liability provision of COGSA. In a pretrial memorandum of law Nedlloyd argued that neither container carried "packages"; rather, it contended, each of the two containers was a "package" in which the plants inside were shipped. Nedlloyd therefore claimed that its liability was limited to $500 per container. Alternatively it proposed that the plants were "goods not shipped in packages" and that its liability accordingly must be limited to $500 per customary freight unit, which it contended was also the container. Binladen counterargued that the plants were individually prepared for shipping and that each therefore counted as a package under COGSA. It also argued that deficiencies in Nedlloyd's bill of lading served to strip the carrier of the benefit of COGSA's liability limits.

At trial in 1984 before Judge Sofaer, virtually all of the six days of testimony was devoted to evidence on liability. Evidence pertaining to the COGSA limitations on liability came out almost entirely in the exhibits, including the bills of lading and several depositions submitted in evidence during the trial. The latter show that one of the containers whose contents perished was the single container shipped from Houston, number ITLU-720073-6. Its bill of lading described the contents as follows:

---

[1]Binladen's complaint invoked admiralty jurisdiction pursuant to Fed. R.Civ.P. 9(h). Jurisdiction over the defendants in the Southern District was based in part upon the presence of the ship within the district during the pendency of the litigation.

PARTICULARS FURNISHED BY THE SHIPPER

NO. OF PKGS.	*DESCRIPTION OF PACKAGES AND GOODS*
1	40' REEFER CONTAINER SAID TO CONTAIN: 7,990 LIVE PLANTS

The other spoiled container had been shipped from Miami under a bill of lading that covered five containers. That bill described a similar type of shipment:

PARTICULARS FURNISHED BY THE SHIPPER

NO. OF PKGS.	*DESCRIPTION OF PACKAGES AND GOODS*
5/40'	REEFER CONTAINERS SAID TO CONTAIN 11735 PCS. LIVE PLANTS MISC. AND 24 PKGS. SHADE CLOTH

Further itemization in the "Description" column listed the "NO. PCS." in the container in which plants died, SCXU-488906, as 2436.

Deposition testimony introduced at trial revealed that the Houston container was loaded chiefly with cacti and that the Miami container carried nearly twenty sorts of plants and trees. Although the parties agreed that the Miami plants were individually potted,[2] they disputed the nature of the packing of the plants in the Houston container. The deposition testimony of Antonio Eduardo Ramirez, the owner of Garden World Nursery in Laredo and the individual who had loaded the Houston container, included an item-by-item breakdown of the packaging methods used. Read in conjunction with the nursery invoices for the sale, this testimony

[2]The invoice/packing list for this Miami container also included 15 boxes of Canna Lilly bulbs, apparently unpotted. These were not mentioned on the bill of lading, and may not even have been included in the number of plants listed on the bill of lading, since the count of plants there was 15 less than the count on the invoice/packing list.

revealed that approximately 2,000 items were individually boxed, tied, or wrapped, more than 2,000 others had been boxed or tied in an unspecified manner, and the remainder had simply been stacked into piles.[3] Ramirez indicated that large sheets of card-

---

[3]A careful reading of Ramirez's testimony along with the invoice/packing list from the nursery, reveals the following packing methods for the plants in the Houston container:

Number	*Item*	*Packaging*
481	Large barrel cacti	"loosely packed"; "stacked"
360	Small barrel cacti	"loosely packed"; "stacked"
250	E. lactea	"loosely packed"; "packed within itself"
490	Wooly Torch (880')	"individually wrapped in paper and tied . . . and then those are stacked"; "wrapped and packed"
734	Mamillaria	"packed in cardboard boxes in their own containers"
175	Eagle Claw	"packed in cardboard boxes in their own containers"
310	Agave Falcata	"stacked within itself"; "loosely packed"
491	Victoria Reginae	"stacked"; "loosely packed"
342	A. trigorous	"boxed"
782	E. pectinatus	"boxed"
250	O. ficus indica	"boxed"
510	L. marginatus (795')	"individually wrapped and stacked"; "wrapped and stacked"
500	Aloe Vera (large)	"loosely packed"
100	Yucca	"tied" and "stacked"; "loosely packed"
500	A. Americana	"tied" and "stacked"; "loosely packed"
280	E. Tirucalli	"stacked"
270	Dasylirion Long	"tied and stacked"; "loosely packed"
34	Bombax Elipticum	"loosely packed"
21	Beaucarnea	"loosely packed"

(Footnote continued on following page)

board, approximately 2½′ by 4′, had been used to separate different kinds of plants and different sections of the container.

Except for reference to the number of containers and plants, none of the foregoing information appeared on the bills of lading. Moreover, the deposition testimony of Philip Elsazsser, the former Binladen employee who had inspected the sorry cargo remnants in Jeddah and who had actually walked through the Houston container, related that he saw no individual pots or boxes in that container. In support of that testimony, Binladen offered photographs taken by Elsazsser during the inspection. No boxes or individual wrapping or tying are evident in these photographs.

The bills of lading setting forth the shipping contracts between Binladen and Nedlloyd were on the standard form employed by Nedlloyd. These forms, a small print on the back, included a "U.S.A. CLAUSE" that expressly incorporated the provisions of COGSA, although it did not explicitly recite the $500 package limit. A blank space on the front of each bill of lading was labeled "EXCESS VALUATION" and referred the reader to a clause on the reverse side setting forth a £100 sterling liability limit per package or unit. Still another provision limited liability to $2 per

---

(Footnote continued from previous page)

Number	*Item*	*Packaging*
625	Orchids (25 boxes)	"boxed"
485	Mixed Cacti	"boxed"
7990	TOTAL	

Thus, almost 2,000 plants were individually tied, wrapped or boxed for travel, i.e., the Wooly Torch (490), the Mamillaria (734), the Eagle Claw (175), and the L. Marginatus (510), plus 25 boxes of orchids. As to more than 2,000 other plants Ramirez indicated that they were tied or boxed, but did not indicate that they were individually packaged. Rather, in answer to a question, he stated that the number of plants per box varied with the size of the item. As to the remaining plants, no individual packaging was mentioned, and some of these (e.g., the large and small barrel cacti (841)) were clearly described as being simply stacked.

kilo gross weight. The parties stipulated that Binladen prepaid to Nedlloyd $14,245.36 each for the five refrigerated containers shipped from Miami under the one bill of lading and $15,420.50 for the transport of the refrigerated container shipped from Houston.

Judge Sofaer found that the carrier had failed to ensure that the proper temperatures, humidity and ventilation conditions were maintained in the containers during the voyage, and he therefore held Nedlloyd responsible for the loss. 593 F.Supp. 546 at 547-50 (1984). Having found Nedlloyd liable, Judge Sofaer then turned to the question of damages and the application of the COGSA $500 per package limit on carrier liability. He did not mention or make findings concerning Binladen's claim that the COGSA limit on liability was wholly inapplicable. Instead, he found that because the "bills of lading disclose the contents of the containers" and because the "parties did not unambiguously agree on a definition of package," the two containers themselves were not "packages" under the Act. 593 F.Supp. at 550-51. The Judge further stated that "[e]ach plant in the two reefers was individually wrapped, potted or separated [and that] some were individually boxed." *Id.* at 551. He thereupon rejected Nedlloyd's argument that its liability should be limited to $500 per container and he awarded damages of $80,332.00 plus interest.

This appeal followed. On appeal, Nedlloyd does not dispute Judge Sofaer's conclusion on liability; it argues only that the Judge incorrectly awarded damages in excess of those permitted by COGSA's § 4(5).

Discussion

Since the enactment of COGSA half a century ago courts have struggled to interpret § 4(5) of the Act, which drastically limits the liability of carriers and ships as follows:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . , or in case of goods not shipped in packages, per customary freight unit, . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted on the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

. . ."

46 U.S.C. § 1304(5).

In resolving disputes between shippers and carriers over the consequences of the $500 per package limit on carrier liability the principal difficulty has lain in defining the meaning and scope of the word "package," a term left undefined by Congress. That problem has been exacerbated by the adoption of new methods of preparing and assembling goods for shipment. *Allied International American Eagle Trading Corp.,* v. *S.S. "Yang Ming,"* 672 F.2d 1055, 1064 (2d Cir. 1982). In construing the statute we have had to evaluate diverse and occasionally idiosyncratic items shipped in various forms—bundles, boxes, cartons, bales, coils, crates, rolls, skids, pallets, and containers—in order to determine what units, if any, constitute COGSA "packages." With the advent of containerized shipping, we have been required to decide when a container provided by a carrier to a shipper may constitute a "package" under COGSA, to which the $500 limit must be applied, and when items within a container must each sepa-

rately be treated as packages. Here, for instance, we must decide whether each container or each plant within a container constitutes a "package" under COGSA.

At the outset we are governed by some basic principles that have been judicially developed for resolution of issues of the type before us. The first of these, rather obvious, is that the touchstone of our analysis should be the contractual agreement between the parties, as set forth in the bill of lading. *See Allied International American Eagle Trading Corp.* v. *S.S. "Yang Ming," supra,* 672 F.2d at 1061 (when "pallets" are counted on bill of lading as the number of "packages" shipped, they, rather than the cartons on each pallet, constitute "packages" within the meaning of § 4(5)). Entries on the bill of lading are thus important evidence of the intent of the parties to the shipping contract, *see Nichimen Co.* v. *M.V. Farland,* 462 F.2d 319, 335 (2d Cir. 1972); *Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts-Gesellshaft,* 375 F.2d 943, 946 (2d Cir.), *cert. denied,* 389 U.S. 831, 88 S.Ct. 97, 19 L.Ed 2d 89 (1967), and the declaration on the bill may bind a shipper even when the contents of the shipment diverge from the description on the bill. *See Mitsui & Co. Ltd.* v. *American Export Lines, Inc.,* 636 F.2d 807, 823 (2d Cir. 1981) ("When the [ship] sailed . . . [the carrier] had no way of knowing that the shipper's representation [that ingots were in "bundles"] was false. . . . [T]his would seem a classic case for the application of estoppel."); *cf. also Aluminios Pozuelo Ltd.* v. *S.S. Navigator,* 407 F.2d 152, 156 (2d Cir. 1968) ("Having specified that the press was 'ONE(1)' package, they must abide by its meaning as a word of liability limitation."); *Associated Metals & Minerals Corp.* v. *A/S D/S Svenborg,* 1984 A.M.C. 376 (S.D.N.Y. 1983) (stating, on this issue, that "an ambiguity in the bill of lading . . . should properly be resolved against the party . . . which prepared the instrument" (citation omitted)), *aff'd mem.,* 738 F.2d 418 (2d Cir. 1984).

Secondly, no controlling definition of the term "package" has been judicially developed other than the requirement that it be the result of some "preparation [of the cargo item] for transportation . . . which facilitates handling, but which does not necessarily conceal or completely enclose the goods." *Aluminios Pozuelo Ltd.* v. *S.S. Navigator, supra,* 407 F.2d at 155. Although this definition excludes certain types of cargo (e.g., loose liquids, potatoes, *Watermill Export, Inc.* v. *MV "Ponce,"* 506 F.Supp. 612, 617 (S.D.N.Y. 1981), or fish, *Bumble Bee Seafoods* v. *S.S. Kiku Maru,* 1978 A.M.C. 1586 (D.Md.)), it is still broad enough to include a wide range of other items, such as a boxed roll of steel weighing 32½ tons, *Mitsubishi International Corp.* v. *S.S. Palmetto State,* 311 F.2d 382 (2d Cir. 1962), *cert. denied,* 373 U.S. 922, 83 S.Ct. 1523, 10 L.Ed. 2d 422 (1963), or materials lashed to skids or pallets, *Aluminios Pozuelo Ltd.,* v. *S.S. Navigator, supra,* 407 F.2d at 156.

Thirdly, since the prevalent large metal shipping container furnished by a carrier is "functionally part of the ship," *Leather's Best, Inc.* v. *S.S. Mormaclynz,* 451 F.2d 800, 815 (2d Cir. 1971),[4] and classification of it as a "package" would violate the purpose of § 4(5) by permitting the carrier to limit its liability unduly, we have refused to hold a shipping container to be a COGSA package, absent a clear agreement between the parties to that effect, at least so long as "its contents and the number of packages or units are disclosed." *Mitsui & Co., Ltd.* v. *American*

---

[4]This court has found that "containers are large metal boxes resembling truck trailers save for the absence of wheels, roughly 8′ high, 8′ wide and with lengths of up to 40′ . . . , capable of carrying hundreds of packages in the normal sense of that term"; that containers "are typically supplied by the carrier, must be returned to the carrier by the consignee, and are used and reused hundred of times"; that "[m]any ships . . . are so constructed that shipments must be made in containers"; and that the shipper "normally . . . [does not pay] for the weight of the . . . container." *Mitsui & Co., Ltd.* v. *American Export Lines, Inc., supra,* 636 F.2d at 816.

Export Lines, Inc., supra, 636 F.2d at 821; *accord, Smythgreyhound* v. *M/V "Eurygenes,"* 666 F.2d 746, 753 (2d Cir. 1981). Thus when the bill of lading discloses not only the number of containers but the number of cartons within them, the cartons, not the containers, will be treated as COGSA packages. *Id.* However, we have left open the question whether a container may be deemed a COGSA package when the bill of lading "does not show how many separate packages or units there are." *Mitsui & Co., Ltd., supra,* 636 F.2d at 821 n. 18. As Judge Friendly noted in *Mitsui & Co., Ltd., id.* at 821, the 1968 Brussels Protocol To Amend the International Convention for the Unification of Certain Rules of Law Relating to BILLS OF LADING, 6 Benedict on Admiralty, 1-25 to 1-30 (7th Ed. 1984), which has been agreed to by some 17 countries, provides that in such a case the "article of transport," i.e., the container, shall be deemed to be the package.[5]

Lastly, absent an agreement in the bill of lading as to packaging of the cargo, goods placed in containers and described as not separately packaged will be classified as "goods not shipped in packages," for which the $500 liability limit would be per "customary freight unit." *Watermill Export, Inc.* v. *MV "Ponce," supra,* 506 F.Supp. at 617.

Applying the foregoing principles to the present case, although the bills of lading listed in the column entitled "No. of Pkgs." the

---

[5]The 1968 Brussels Protocol provides in pertinent part:

"Article 2

". . .

"(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package unit."

number of containers shipped and revealed the total number of plants in the containers, they gave no indication whether or how the plants were packaged. The case is therefore significantly different from *Smythgreyhound, Mitsui & Co., Ltd.*, and other decisions cited *supra*, in which the bill of lading listed not only the number of containers but the number of items qualifying as packages (i.e., connoting preparation in some way for transport), such as "bundles," "cartons," or the like. We cannot accept Binladen's contention that the reference in the bills of lading to the number of plants qualifies each plant as a separate COGSA package.[6]

---

[6]Binladen asks us to find that Nedlloyd waived any claim to the $500 per package limitation with regard to the shipment from Miami. The shipper bases this claim on several statements by Nedlloyd's counsel at the start of the trial below, namely:

> "Now, in the container that went out from Miami, they are actually potted. However, the ones that went out from Houston, although the witness in Houston stated that some of them were packaged, the plaintiff's witness was on hand in Jeddah.
>
> . . .
>
> "I have no problem with the Miami plants. They were plants. They were potted. But all of a sudden when you get the testimony of the plaintiff's witnesses, there was absolutely no packaging in the containers from Houston. . . .

We decline to hold that Nedlloyd's has waived limited liability as to the Miami shipment. The statements above are not unambiguous waivers of Nedlloyd's contractual rights. They appear merely to reflect counsel's acknowledgment that there was no factual dispute about the potting of the Miami plants and his recognition that there was a much stronger case to be made that many of the Houston plants were wholly untreated in preparation for shipment. At the very time of this conversation, the trial judge was on notice that Nedlloyd sought to apply the liability limit to both the Miami and Houston shipments. Nedlloyd had explicitly made both arguments in a pretrial memorandum of law. Although Nedlloyd's post-trial memorandum of law restated the argument for limited liability as to the Houston shipments but did not do so as to the Miami shipment, we do not view this omission as constituting a waiver of its statutory rights as incorporated into the shipping contract.

It is true that some of the plants were in fact prepared for shipment in ways that might have entitled them, if properly described in the bill of lading, to treatment as packages as defined in *Aluminios Pozuelo, Ltd.* v. *S.S. Navigator, supra.*[7] But the word "plant," standing alone in a bill of lading, does not describe an item that has been packaged for transport. Nor can a carrier that has agreed to transport a container described in the bill of lading as filled with a certain number of "live plants" reasonably infer from this description that each plant has been so packaged.[8] Some plants may be simply stowed or stacked without potting, tying, wrapping or other preparation for shipping, in which event they are not individual packages but rather "goods not shipped in packages." *Cf. Watermill Export, Inc.* v. *MV "Ponce," supra,* 506 F.Supp. at 617 (loose potatoes shipped in trailers); *see also Mitsui & Co.,*

---

[7]We need not reach the question of which plants were prepared for transport in a way entitling them to be classified as packages, nor need we calculate exactly how many packages there were in the Houston container, given the various ways in which these plants were loaded. One may reasonably argue, for instance, that the plants in the Miami container may have been placed in pots to keep them alive, not for purposes of transport. Nor do we reach the question whether our conceptual definition of a package may impose limits on the types of items that parties may agree to treat as packages. *Cf. Bumble Bee Seafoods* v. *S.S. Kiku Maru,* 1978 A.M.C. 1586 (D.Md.) (refusing to hold that a shipment of 67,222 fish was a shipment of that many packages, even though that number was entered in the "Packages" column on the bill of lading and no other count was apparently given).

[8]Although a Department of Agriculture phytosanitary certificate accompanying the Miami shipment listed the plants involved as "packed loose in pots within sea wheel trailers," this mention of packaging in a supplemental document of this nature, particularly one unrelated to the contract between the parties, cannot substitute for disclosure in the bill of lading. This document was apparently issued to the nursery that packed the plants into the Miami container and may not even have been read by the carrier. Unlike a bill of lading or a dock receipt, *cf. Standard Electrica, S.A.* v. *Hamburg Sudamerikanische Dampfschifffahrts Gesellshaft, supra,* 375 F.2d at 946, it has no bearing on the agreement between the parties.

Ltd. v. *American Export Lines, supra,* 636 F.2d at 821-22 (stacks of ingots). Indeed, the testimony of Ramirez, the owner of the nursery and the person who loaded the Houston container, amply documents that some plants can be transported without packaging, or packaged singly or in groups of up to 25 or more.[9] According to the bills of lading in the present case, which constitute the agreements between the parties, each of the "plants," as so described, cannot be viewed as an individual COGSA package. This case is therefore analogous to *Sperry Rand Corp.* v. *Norddeutscher Lloyd,* 1973 A.M.C. 1392, 1398-99 (S.D.N.Y.), in which Judge Lumbard was confronted with a bill of lading that listed the "number and kind of packages" as "1 container" and described the contents as 9,500 electric shavers. Although it was shown at trial that there were actually 190 cartons packed with 50 shavers each, Judge Lumbard correctly refused to hold the cartons (and the shavers) to be packages under COGSA and instead held the container to be the package.[10]

---

[9]This testimony in fact indicates that many plants in the Houston shipment were stacked without packaging. In this respect, we find clearly erroneous Judge Sofaer's statement that "[*e*]*ach* plant . . . was individually wrapped, potted or separated [and that] some were individually boxed" (emphasis added).

Although it was reasonable for Judge Sofaer to have rejected Elsazsser's testimony that there were no packages at all, the Judge's factual finding cannot be sustained by reference to the Ramirez deposition, the only other evidence concerning packaging within the Houston container. While Ramirez indicated that *many* of the plants were individually treated in the ways described by Judge Sofaer, he did not state that all of them were. Rather, the deposition makes clear that about 2,000 were so treated, many others were tied, wrapped or boxed in an unspecified number, and the remainder, nearly 3,000, were loosely packed, i.e., stacked logcabin style in piles, which might in turn be separated from each other by large cardboard dividers. *See supra* note 3.

---

[10]In *Marcraft Clothes, Inc.* v. *M/V "Kurobe Maru,"* 575 F.Supp. 239, 242-43 (S.D.N.Y. 1983), on which Judge Sofaer relied, there was a clearer

(Footnote continued on following page)

There remains the question, reserved in *Mitsui's* footnote 18 and in *Smythgreyhound,* of whether, when a bill of lading lists only the number of containers under "No. of Pkgs." and does not describe the cargo in terms of items that can reasonably be understood as packages, the parties must be deemed to have agreed that each container constitutes a COGSA package. The principal argument against so holding is our repeatedly-expressed reluctance for sound reasons to treat a container as a package. *See Mitsui, supra,* 636 F.2d at 816-17; *Leather's Best, supra,* 451 F. 2d at 815; *Smythgreyhound, supra,* 666 F.2d at 750-55. On the other hand, nothing precludes the parties from agreeing in their contract (the bill of lading) that each container shall constitute a package. Indeed, recently, in *Allied International American Eagle Trading Corp.* v. *S.S. "Yang Ming," supra,* we took the view that in the present circumstances the container must be treated as a COGSA package, stating in dicta that:

> "when the bill of lading expressly refers to the container as one package, or when the parties fail to specify an alternative measure of the 'packages' shipped, the courts have no choice but to respect their express or implied understanding and to treat the container as a single package." 672 F.2d at 1061.

Moreover, we have held a container to be a COGSA package when it contained unpacked household goods that would, absent a container, have been shipped in a crate of comparable size. *Ros-*

(Footnote continued from previous page)

factual basis for holding each of 4,400 men's suits to be a package, since each was individually wrapped in plastic. It is not clear from that decision what figure was entered in the "packages" column of the bill of lading, although the description of goods was apparently simply "4,400 Sets of Men's Suits with Vest." *Id.* at 242. If the entry in the "packages" column was "1 container," (which we cannot determine from the decision), we would, absent further information, be inclined to disagree with the decision.

enbruch v. *American Export Isbrandtsen Lines, Inc.*, 543 F.2d 967; 969-70 (2d Cir.), *cert. denied*, 429 U.S. 939, 97 S.Ct. 353, 50 L.Ed.2d 308 (1976).

Upon balancing these conflicting considerations we are satisfied, notwithstanding our traditional reluctance to treat a container as a COGSA package, that the terms of the bill of lading should govern; if the bill of lading lists the container as a package and fails to describe objects that can reasonably be understood from the description as being packages, the container must be deemed a COGSA package. This rule not only accords with the 1968 Brussels Protocol, *supra*, but has the virtue of certainty. As we have noted, "only when the meaning of package is predictable will the parties concerned know when there is a need to place the risk of additional loss on one or the other accordingly." *Aluminios Pozuelo, Ltd.* v. *S.S. Navigator, supra*, 407 F.2d at 156.

When a bill of lading specifies the number of containers but does not reveal the number of packages inside, the only certain figure known to both parties is the number of containers being shipped. In such event the carrier cannot be charged with knowledge of whether the container is filled with packages, with unpackaged goods, or with some combination. The carrier should not be expected to assume the risk inherent in such uncertainty, facing liability that might vary by orders of magnitude depending on the exact packaging of goods inside a sealed container, even though this information was not revealed to it by the bill of lading.

We accordingly hold that, when the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as a COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of "goods not shipped in packages." Maximum damages in such a situation then are $500 per container, irrespec-

tive of the contents. Although this rule could drastically reduce the damage available to shippers in some situations, it does not depart from the principle that the limited liability clause in COGSA was designed to " 'set a reasonable figure below which the carrier should not be permitted to limit his liability,' " *Mitsui, supra,* 636 F.2d at 817 (quoting *Leather's Best, supra,* 451 F.2d at 815). It simply recognizes that within the constraints of the lower limit on liability set by COGSA, the allocation of risk in shipping is a matter governed by contract, and one best determined by the explicit agreement of the parties. The ability of the shipper and carrier to contract fairly for the division of liability between themselves depends in turn on disclosure of the relevant information about the packaging of the goods being shipped. The shipper retains the power to protect itself by stating in plain terms on the bill of lading the number of COGSA packages being shipped. Any other interpretation would prevent the carrier from accurately assessing its potential liability at the time it contracts to transport the goods.

We recognize that the rule established by us today which will henceforth limit a carrier's liability under the same circumstances to $500 per container, resolves an uncertainty noted in earlier decisions (e.g., *Mitsui* and *Smythgreyhound*) and that, in view of this uncertainty, the parties might have reasonably believed that the description of the number of plants on the bills of lading was sufficient to bring the shipment within the *Smythgreyhound* rule to the effect that a container whose contents are disclosed (there, however, in terms of packages) should not itself be treated as a package.[11] Accordingly, the rule we announce will not be

[11]Moreover, previous cases have held that the number entered in the packages column on the bill of lading is not itself determinative of the number of COGSA packages, *see, e.g., Solar Turbines Inc.* v. *S.S. "Al Shidadiah,"* 575 F. Supp. 939, 942 (S.D.N.Y. 1983) (declining to find the entry in the packages column on the bill of lading determinative of

(Footnote continued on following page)

applied retroactively but prospectively to bills of lading prepared after the date of this decision.

With respect to the present case, since the plants described on the bills of lading clearly are not packages, they will be deemed to be "goods not shipped in packages" within the meaning of COGSA, which limits the carrier's liability in such a case to $500 per "customary freight unit," which is generally the unit on which the freight charge is based for the shipment at issue. *See General Motors Corp.* v. *Moore-McCormack Lines, Inc.*, 451 F.2d 24, 25-26 (2d Cir. 1971) (per curiam), *Eaton Corp.* v. *S.S. "Galeona,"* 474 F.Supp. 819, 823 (S.D.N.Y. 1979); Edelman, *Cargo Claims and Limitation of Liability*, 17 Forum 719, 736 (1981). Nedlloyd argues that since it was paid a flat rate per container for shipping, regardless of use or weight, its liability should be limited to $500 per container. *See Croft & Scully Co.* v. *M/V Skulptor Vuchetich*, 664 F.2d 1277, 1282 (5th Cir. 1982) (holding that a container was not a package, but remanding for a factual determination of whether it was the customary freight unit). However, the court below made no findings as to the customary freight unit in shipments of this sort and we are reluctant to do so in the first instance. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92, 102 S.Ct. 1781, 1791-92, 72 L.Ed. 2d 66 (1982).

We therefore remand the case to the district court to determine what the customary freight unit is for a shipment of plants of this

---

(Footnote continued from previous page)

whether the trailer-enclosed generator was a package or a good not shipped in packages); *General Motors Corp.* v. *S.S. Mormacoak*, 327 F.Supp. 666, 668 (S.D.N.Y.) (stating that the "fact that the bill of lading stated that the 'No. of Pkgs.' was 3 is not conclusive," and therefore holding that a 3 piece power plant constituted a good not shipped in packages), *aff'd on other grounds sub nom. General Motors* v. *Moore-McCormack Lines*, 451 F.2d 24 (2d Cir. 1971).

type and to award Binladen damages in an amount up to $500 for each such unit.[12]

---

[12]We find no merit in Binladen's various claims that Nedlloyd should be deprived of the benefit of COGSA's limited liability provision because of deficiencies in the bill of lading. Although Judge Sofaer did not reach this issue, we may rule on it here since it entails no factual findings outside the bill of lading, the terms of which are uncontested.

As Judge Sofaer recognized, the bill included a "USA CLAUSE" explicitly incorporating COGSA's provisions in international voyages involving U.S. ports. That same clause also clearly contemplated that COGSA provisions would supersede any conflicting provisions in the bill of lading. As such, the other, lower, liability limits stated in the bill of lading are void, 46 U.S.C. §§ 1303(8), 1304(5); *David Crystal, Inc.* v. *Cunard Steam-Ship Co., Ltd.*, 339 F.2d 295, 298 (2d Cir. 1964), *cert. denied*, 380 U.S. 976, 85 S.Ct. 1340, 14 L.Ed.2d 271 (1965). However, the mere attempt to limit liability at a level lower than permitted by COGSA does not serve to strip a carrier of the COGSA limit. *See, e.g., Watermill Export, Inc.* v. *MV "Ponce," supra*, 506 F.Supp. at 615-16; *Sperry Rand Corp. v. Norddeutscher Lloyd, supra*, 1973 A.M.C. at 1399-1400.

In view of the incorporation of COGSA and the existence of a space on the front of the bill of lading providing an opportunity for the declaration of excess value, and even the inclusion of other, albeit invalid, liability limits, the shipper here cannot be heard to claim that it lacked notice of the prospect that its recovery per package would be limited. This case is quite different from *General Electric Co.* v. *M.V. Lady Sophie*, 458 F.Supp. 620, 622 (S.D.N.Y. 1978), on which Binladen relies and in which the bill did not specifically refer to COGSA and did not provide a space for declaring the excess value of the goods shipped. Although it would certainly be helpful if Nedlloyd's bill of lading were more clearly laid out, we do not agree that any of the alleged infirmities stripped Nedlloyd of COGSA's $500 limit per package or customary freight unit.

Order Denying Petition For Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Sixteenth day of May, one thousand nine hundred and eighty-five.

84-7710

BINLADEN BSB LANDSCAPING,

Plaintiff-Appellee,

—v.—

M.V. "NEDLLOYD ROTTERDAM", her engines, boilers, etc., NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Binladen BSB Landscaping,

Upon consideration by the panel that heard the appeal, it is

Odrered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Filed May 16, 1985

Opinion of the District Court

BINLANDEN BSB LANDSCAPING,

Plaintiff,

—against—

M.V. NEDLLOYD "ROTTERDAM," her engines, boilers, etc., and Nedlloyd Lijnen B.V. (Nedlloyd Lines),

Defendants.

No. 82 Civ. 1037 (ADS)

United States District Court,
S.D. New York.

June 25, 1984.

Landscaper, as shipper consignee, sued ocean carrier for loss of two refrigerated containers of live plants shipped from United States to Saudi Arabia. The District Court, Sofaer, J., held that: (1) there was no proper inspection of malfunctioning container prior to voyage; (2) excess humidity, resulting from delayed hookup and container malfunctions, most probably caused death of the plants; (3) normal admiralty rule applied in view of incorporation of Carriage of Goods by Sea Act in bill of lading and absent contrary custom or port usage; (4) Saudi port rules embodied common-law rule that carrier is responsible for any loss caused by negligence of terminal operator, and (5) liability was not limited to $500 per refrigerated container.

Judgment for consignee.

SOFAER, District Judge:

Plaintiff, Binladen BSB Landscaping (hereinafter "Binladen"), was the shipper and consignee of a shipment of ten refrigerated containers of live plants from the United States to Jeddah, Saudi Arabia in June and July 1980. Nine containers were shipped from

Miami under Miami/Jeddah bills of lading RC-1 and RC-2 dated June 14, 1980. One container was shipped from Houston under Houston/Jeddah bill of lading RC-1 dated June 11, 1980. Def. Ex. B, C, D. The plants involved in this shipment were to be used in a landscape project at one of the palaces of the then—Crown Prince Fahd, the present King of Saudi Arabia. Prior to this shipment plaintiff had received other refrigerated shipments of live plants in Saudi Arabia. Lavargna Dep. 33, 42-44.

Defendant, Nedlloyd Lijnen B.V. (hereinafter "Nedlloyd"), was the owner and operator of the M.V. "NEDLLOYD ROTTERDAM" during the time of the events in question. The containers in question were carried on board the NEDLLOYD ROTTERDAM Voy. 0115, a fully containerized, roll on-roll off vessel. When the shipment was picked up by plaintiff in Jeddah, the plants in two containers were diseased and destroyed, resulting in a loss to plaintiff of the freight and value of those plants. After a trial to the court, plaintiff established that defendant is liable for its total loss, for the reasons set forth in the following findings and conclusions.

Plaintiff paid freight on a container basis, at a rate that reflected the additional cost of refrigeration. The containers were properly packed by plaintiff's suppliers, and returned to the load ports for loading. All the plants shipped had been properly inspected and were in good condition when delivered to Nedlloyd. Ramirez Dep. 12, 18, 34-38. One of the containers at issue, ITLU 720073-6, was delivered to Nedlloyd in Houston on June 10, 1980. The other, SCXU488906-1, was delivered to Nedlloyd in Miami on June 13, 1980. Nedlloyd failed to produce partlow charts which would have demonstrated whether these containers were operating properly prior to their being connected to power on board the NEDLLOYD ROTTERDAM.

With respect to the Houston container, the temperature speci-

fied by plaintiff (78°) was appropriate for the plants shipped. Tr. 197-201. The court rejects testimony to the contrary. Tr. 184-85. The plants could not properly be transported without air circulation and refrigeration that kept down the humidity in the container. Nedlloyd as carrier of the plants and supplier of the reefers should have known the proper manner of maintaining the temperature specified, and was obligated to provide reefers that functioned properly in all material respects, including their capacity to dehumidify. *Carribean Produce Exchange, Inc.* v. *Sea Land Service, Inc.*, 415 F.Supp. 88 (D.P.R. 1976) (carrier cannot avoid responsibility for operation of refrigeration); *Atlantic Banana Company* v. *M.V. "CALANCA"*, 342 F.Supp. 447, 452 (S.D.N.Y. 1972), *aff'd mem.*, 489 F.2d 752 (2d Cir. 1974). If the container lacked circulation, as Mr. Hans Zutter assumed, then Nedlloyd is responsible for that result, although the proof did not establish a lack of circulation. The container used for the Houston/Jeddah trip was not properly checked, despite two potentially significant malfunctions before the trip. First, it was inoperative when delivered to Garden World, plaintiff's supplier in Laredo. Nedlloyd's agent arranged for repairs, consisting of a fuse replacement and adding the refrigerant freon. Pl.Ex. 12; Ramirez Dep. 7, 27. Second, when the container was delivered to the Nedlloyd terminal in Houston it was inspected and again found to be low in freon; a sight-glass was tightened, apparently because it was thought to be the source of the leak.

This was not an adequate response to the condition. As all the experts testified, including Nedlloyd's the container should have been checked comprehensively after two shortages of freon to determine the source of the leaks. Tr. 130-32; 225-26; 294-95. No such check was done. A proper inspection prior to the voyage would also have included a check of the calibration of the reefer sensors which activate the switch that initiates the heating mode. Tr. 46, 313-314. Nedlloyd produced no pre-trip partlow charts or other evidence of proper inspection and calibration. As the ex-

pert Robert J. Wall's testimony suggests, such lack of proper records of maintenance and operation was inconsistent with proper practice. *See, e.g. Tupman Thurlow Co.* v. *S.S. CAP CASTILLO*, 490 F.2d 302, 308 (2d Cir. 1974).

The Houston container was received by Nedlloyd at Houston on June 10 at 4:13 p.m. Pl.Ex. 17. The available evidence establishes it was hooked up to power on the ROTTERDAM at 5:00 a.m., June 11. *See* Def.Ex.N. Nedlloyd's partlow charts for the period prior to 5:00 a.m., June 11, are missing, so it is impossible to know whether the proper practice was followed, or whether the container was left disconnected for about half a day. Nedlloyd failed to produce the partlow charts that would have cleared up this uncertainty.

The Houston container never defrosted during the voyage to Jeddah. Pl.Ex. 28, 37; D.Ex.N.; Tr. 100-01, 123-24, 272; Meijer Dep. 70. Why this occurred is not entirely clear, but may have resulted from improper calibration, the shortage of freon, or some other deficiency. *See, e.g.*, Tr. 298, 305-06. A build-up of humidity was certain to occur which, along with the earlier stress placed on the plants through a delayed hook-up, could readily explain the bacterial growth that killed the plants. A telex sent by the Nedlloyd representative at Jeddah on February 24, 1981, stated that the Houston container was malfunctioning when it left the ship. Pl.Ex. 35. This statement was later reversed, but the court is not satisfied that the statement was in fact erroneous, given the other evidence and the unlikelihood that container numbers could have been confused.

The other container in which all the plants shipped died was SCXU488906-1, or the Miami container. It was properly loaded and packed, with healthy plants, and delivered to Nedlloyd with four other filled containers. The carriage temperature specified (58°F) was correct, and the plants in the other containers in this

shipment arrived in Jeddah without significant damage. As with the Houston container, Nedlloyd's proof of proper handling is deficient.

The Miami container was delivered to Nedlloyd on June 13, 1980, at 5:00 p.m.; the first proof that it was hooked up to electricity was a chart commencing at 6:00 a.m. on June 16. D.Ex.M., Tr. 230-31. In addition, the first temperature recorded on the relevant partlow chart was 66°F, rather than 58°F, and during June 13-15 the daily high temperature went far above 58°F, averaging some 85°F. Pl. Ex. 39. This container also failed to defrost for at least two days. D.Ex.M; Tr. 107-111, 117. If the container was not ventilated, as counsel for Nedlloyd suggested when convenient for him to do so, failure to properly open the vents was Nedlloyd's fault. Pl.Ex. 37; Tr. 176-77, 189-90. In fact, ventilation must have been provided to all containers, or all would have been delivered with dead plants. The combination of the delayed hookup, after an unrefrigerated trip on land, with the failure to dehumidify for two days probably damaged the plants even though the container subsequently functioned properly during the voyage. *See* Tr. 173-79.

Thus, excess humidity, resulting from a delayed hookup and container malfunctions, most probably caused the death of the plants in both the Miami and Houston containers. *See e.g.*, Lavargna Dep. 25-26. In connection with both containers, court credits the testimony of Douglas L. Roberts that the reefers must not have been operating properly.

Both the Houston and Miami containers failed to function properly after delivery at Jeddah to MTI, the port's terminal operator, on July 4. It is more probable than not that the plants in both were already irreversibly damaged, which finding is based in part on Nedlloyd's failure to produce proper records. *S.S. CAP CASTILLO,* 490 F.2d at 308. (The nonproduction of material

evidence which is in control of a party raises an inference that the evidence is unfavorable to that party). In any event, delivery did not occur when the containers were given by Nedlloyd to MTI, but when they were picked up by Binladen, within a reasonable time after notice of their arrival. Binladen was under no obligation to remove the two containers immediately after getting the claimed notice of their malfunction from Alatas, Nedlloyd's agent. Furthermore, such action by the time of notice would not have prevented the damage in light of the extremely high temperatures involved, and might not even have resulted in Binladen's obtaining the containers under Saudi rules. *See* Meijer Dep. 139-41. Moreover, the containers had apparently been malfunctioning after discharge; MTI, whose responsibility it was to notify Alatas of container malfunctions, D.Ex. K.K. § 3.3., failed to notify Alatas as to the Houston container malfunction and did not tell Alatas of the Miami container malfunction until four or five days after discharge. Meijer Dep. 129-30.

The normal admiralty rule applies here, because Nedlloyd incorporated COGSA into its bills of lading, and no contrary custom or usage of the port of destination has been satisfactorily or convincingly established. *See Tapco Nigeria, Ltd.* v. *M/V WESTWIND*, 702 F.2d 1252, 1255 (5th Cir. 1983) (custom, regulations, or law of port of destination can modify common law requirements), *cf. Farrell Lines Inc.* v. *Highlands Ins. Co.*, 696 F.2d 28 (2d Cir. 1982) (carrier discharged of responsibility because of port's custom and usage). While the Saudi port regulations reserve control to Saudi authorities over the handling and discharge of goods, those rules fail to establish that the port authorities act in behalf of the consignee rather than the carrier. Nedlloyd as carrier pays the Saudi port authority for its services, *see* D.Ex. KK, including specifically the surcharge for the first three days for connecting and maintaining reefers, and for notifying the shipper of malfunctions. *Id.* § 3.3. Binladen, on

the other hand, had no contact with the port authorities except to pick up its goods when authorized to do so by Nedlloyd.

Nor do the rules establish that Nedlloyd relinquished total control of the goods to MTI. *Cf. Tapco,* 702 F.2d at 1260 (regulations requiring that government-employed stevedores take *total control* of the cargo from ship's holds until *finally delivered* to consignee absolved carrier from any responsibility for losses during unloading). To the contrary, the Saudi port regulations make clear that the carrier, through its agent, retains certain responsibilities with respect to the cargo, even following discharge at port of the containers.

For instance, it is the ship agent's responsibility to undertake, "on behalf of the vessel, its owners, or its charterers, all activities related to goods." *Rules and Regulations for Saudi Arabian Seaports,* Part 2, § 2.2.2.2. (1980). Specifically, the ship's agent must notify consignees when the goods arrive, § 6.2.9.1, and "shall attend to all loading and unloading operations" and may provide independent tally clerks "to count the parcels of every consignment, record their condition and make any qualifications or observations and take remedial action where necessary." § 2.2.2.3. "Delivery of goods" is permitted under Saudi regulations only "on presentation of a Bill of Lading or Delivery Order duly endorsed by the ship's agent." D.Ex. "D.D."; §7.10.1. Also, it is the ship's agent's duty to "send regular reminders to consignees to take delivery of any overdue containers or trailer from the port." § 7.11.2. The above rules seem to indicate that it is the ship's agent, rather than the terminal operator or consignee, who must keep track of the container until the goods have been delivered to the consignee.

Other port regulations which tend to show that the carrier retains some control over the cargo even after the cargo has been discharged by the terminal operator are the requirements that

the ship's agent supply the Port Management with a "detailed list of containers which have been lying in the port for a period of more than 15 days", § 7.6.2(e), and that the agent return full details of any container that the consignee refuses to release or return. § 7.6.5.

Nedlloyd has also failed to establish that the regulations control issues of liability among the parties so as to require Binladen to sue the Saudi port authorities. The rules provide that the carrier is responsible for any loss caused by the negligence of the "terminal operator," which is the common-law rule. D.Ex. D.D.; *see* § 7.17.3. The provision establishing the terminal operator's liability to the "owner" appears to relate to the terminal operator's responsibility to indemnify the carrier, and cannot safely be read to control the carrier's obligations. Nothing in the regulations suggests that, as between carrier and consignee, the consignee must bear the risk of loss from the time that the goods are discharged from the vessel to the time the goods are delivered to the consignee. Nedlloyd's corporate secretary, Joan C. Walker, testified that she could not locate the contract between Nedlloyd and Alatas, which may have cast further light on these issues. Tr. 67.

Thus, even if Binladen had failed to prove that the plants were irreversibly diseased when delivered to the Jeddah port authorities, it would be entitled to the evidentiary benefits that flow from establishing a prima facie case. The plants were certainly lost when delivered to the consignee (or indeed by the time the consignee was notified of the container malfunctional), so Nedlloyd was responsible for the damage, having failed to establish any exception to the rule. *See* 46 U.S.C. § 1300; *S.S. CAP CASTILLO,* 490 F.2d at 303.

Nedlloyd's argument that its liability should be limited to $500.00 per container is untenable. Carrier-furnished containers

whose contents and number have been fully disclosed on the bill of lading are not COGSA "packages." *Mitsui & Co., Ltd.* v. *America Export Lines, Inc.*, 636 F.2d 807, 818 (2d Cir. 1981). Here, Nedlloyd furnished the two containers, and the bills of lading disclose the contents of the containers as being "7790 LIVE PLANTS" and "11420 LIVE PLANTS MISC. AND 24 PKGS. SHADE CLOTH". D.Ex. B, C, D. Each plant in the two reefers was individually wrapped, potted, or separated; some were individually boxed. Moreover, the parties did not unambiguously agree on a definition of package, so the containers are conclusively presumed not to be individual packages. *Smythgreyhound* v. *M/V "EURYGENES"*, 666 F.2d 746, 753 n. 20 (2d Cir. 1981). The bills of lading each include in the column titled "NO. OF PKGS." the number "1". But this is hardly the unambiguous declaration necessary to put the shipper on notice of a limitation of liability. *See generally Marcraft Clothes, Inc.* v. *M/V KUROBE MARU"*, 575 F.Supp. 239 (S.D.N.Y. 1983) and cases cited therein.

The losses alleged by plaintiff have not been controverted. The clerk will therefore enter judgment in plaintiff's behalf against defendants for $80,322.00 plus interest at 12% from the date of delivery. July 4, 1980, and costs.

SO ORDERED.

STATUTE

Carriage of Goods by Sea Act

§ 1301. Definitions

When used in this chapter—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Apr. 16, 1936, c. 229, § 1, 49 Stat. 1208.

§ 1302. Duties and rights of carrier

Subject to the provisions of section 1306 of this title, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities

and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title.

April 16, 1936, c. 229, § 2, 49 Stat. 1208.

§ 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

Contents of bill

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quan-

tity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: *Provided,* That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

Bill as prima facie evidence

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b) and (c), of this section: *Provided,* That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Guaranty of statements

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

Notice of loss or damage; limitation of actions

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima

facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and she ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided,* That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"Shipped" bill of lading

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: *Provided,* That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the

date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

Limitation of liability for negligence

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Apr. 16, 1936, c. 229, § 3, 49 Stat. 1208.

§ 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided,* That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect

of the agents or servants of the carrier contributed to the loss or damage.

Freedom from negligence

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

Deviations

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event

shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Inflammable, explosive, or dangerous cargo

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Apr. 16, 1936, c. 229, § 4, 49 Stat. 1210.

§ 1305. Surrender of rights; increase of liabilities; charter parties; general average

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this chapter shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under

a charter party; they shall comply with the terms of this chapter. Nothing in this chapter shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

Apr. 16, 1936, c. 229, § 5, 49 Stat. 1211.

§ 1306. Special agreement as to particular goods

Notwithstanding the provisions of sections 1303 to 1305 of this title, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided,* That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: *Provided,* That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

Apr. 16, 1936, c. 229, § 6, 49 Stat. 1211.

§ 1307. Agreement as to liability prior to loading or after discharge

Nothing contained in this chapter shall prevent a carrier or a

shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

Apr. 16, 1936, c. 229, § 7, 49 Stat. 1212.

§ 1308. Rights and liabilities under other provisions

The provisions of this chapter shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

Apr. 16, 1936, c. 229, § 8, 49 Stat. 1212.

§ 1309. Discrimination between competing shippers

Nothing contained in this chapter shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand to receive bills of lading subject to the provisions of this chapter; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

Apr. 16, 1936, c. 229, § 9, 49 Stat. 1212.

§ 1310. Weight of bulk cargo

Where under the customs of any trade the weight of any bulk

cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

Apr. 16, 1936, c. 229, § 11, 49 Stat. 1212.

§ 1311. Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

Apr. 16, 1936, c. 229, § 12, 49 Stat. 1212.

§ 1312. Scope of chapter; "United States"; "foreign trade"

This chapter shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter the term "United States" includes its districts, territories, and possessions. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to

the provisions of this chapter, shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter.

April 16, 1936, c. 229, § 13, 49 Stat. 1212; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352.

§ 1313. Suspension of provisions by President

Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this chapter, effective during any period when sections 1301 to 1308 of this title, or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

Apr. 16, 1936, c. 229, § 14, 49 Stat. 1213.

§ 1314. Effective date; retroactive effect

This chapter shall take effect ninety days after April 16, 1936; but nothing in this chapter shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title issued, whether before or after such date in pursuance of any such contract as aforesaid.

Apr. 16, 1936, c. 229, § 15, 49 Stat. 1213.

§ 1315. Short title

This chapter may be cited as the "Carriage of Goods by Sea Act."

Apr. 16, 1936, c. 229, § 16, 49 Stat. 1213.

No. 85-261

Supreme Court, U.S.
FILED
SEP 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BINLADEN BSB LANDSCAPING,

Petitioner,

—against—

M.V. "NEDLLOYD ROTTERDAM", her engines, boilers, etc., NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD H. SOMMER
Counsel of Record
KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520
Attorneys for Respondent

J. SCOT PROVAN
ARTHUR E. HOFFMANN, JR.
Of Counsel

BEST AVAILABLE COPY

QUESTION PRESENTED

The only question fairly presented for review is whether the Court of Appeals for the Second Circuit correctly held that, in construing the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (West 1975), where the bill of lading contract entered into between a shipper and an ocean carrier does not include a shipper-supplied description of an alternative number of "packages", lists a marine cargo container as a package and the contracting parties have not specified that the shipment is one of "goods not shipped in packages", the container is properly considered a "package" in applying the "per package" limitation of an ocean carrier's liability contained in the statute?

STATEMENT REQUIRED BY RULE 28.1

Respondent Nedlloyd Lijnen B.V. (Nedlloyd Lines) is a wholly owned subsidiary and division of the Royal Nedlloyd Group N.V. Other divisions of the Royal Nedlloyd Group N.V. which are affiliates of Respondent Nedlloyd Lijnen B.V. are:

Nedlloyd Bulk
Neddrill
Mammoet Transport
Nedlloyd Fleet Services
Damco International Transport
Transavia
Nedlloyd Energy

A list of subsidiaries of the Royal Nedlloyd Group N.V. which are affiliates of Nedlloyd Lijnen B.V., complete as of May, 1985, is annexed hereto as Appendix A.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 28.1	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT OF CERTIORARI	4
I. PETITIONER LACKS STANDING TO SEEK REVIEW OF THE QUESTIONS PRESENTED IN THE PETITION	4
II. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR WITH DECISIONS OF THE COURTS OF APPEAL FOR THE FIFTH, NINTH OR ELEVENTH CIRCUITS	6
III. THE DECISION OF THE COURT BELOW IS CORRECT AND IN ACCORD WITH ITS PRIOR DECISIONS	9
IV. THE QUESTION(S) PETITIONER RAISES DO NOT MERIT REVIEW	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: PAGE

Allied Int'l American Eagle Trading Corp. v. S.S. YANG MING, 672 F.2d 1055 (2d Cir. 1982)..... 9

Allstate Insurance Co. v. Inversiones Navieras Imparca, C.A., 646 F.2d 169 (5th Cir. 1981).....7, 8, 9

Baker v. Carr, 369 U.S. 186 (1962) 4

Binladen BSB Landscaping v. M.V. NEDLLOYD ROTTERDAM, 593 F. Supp. 546 (S.D.N.Y. 1984), rev'd and remanded, 759 F.2d 1006 (2d Cir. 1985).....2, 3, 5, 6

Hartford Fire Insurance Co. v. Pacific Far East Line, Inc., 491 F.2d 96[illegible] (9th Cir.), *cert. denied*, 419 U.S. 873 (1974)..... 8

Hayes-Leger Associates, Inc. v. M/V ORIENTAL KNIGHT, 765 F.2d 1076 (11th Cir. 1985) 7, 8

Jenkins v. McKeithen, 395 U.S. 411 (1969) 4

Kirchberg v. Feenstra, 450 U.S. 455 (1981) 5

Leather's Best, Inc. v. S.S. MORMACLYNX, 451 F.2d 800 (2d Cir. 1971) 6

Mitsui & Co., Ltd. v. American Export Lines, 636 F.2d 807 (2d Cir. 1981).....6, 7, 8, 9, 10, 11

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) 6

Rosenbruch v. American Export Isbrandtsen Lines, Inc., 543 F.2d 967 (2d Cir.), *cert. denied*, 429 U.S. 939 (1976) 10

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)..... 4

PAGE

Smythgreyhound v. M/V EURYGENES, 666 F.2d 746 (2d Cir. 1981) 8, 9, 10, 11

Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampschifffahrts-Gessellschaft, 375 F.2d 943 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) 9

Stanton v. Stanton, 421 U.S. 7 (1975) 4

Watermill Export, Inc. v. M.V. PONCE, 506 F. Supp. 612 (S.D.N.Y. 1981) 10

Statutes, Rules and International Conventions:

(1) Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901, (West 1978) 6
(2) United States Carriage of Goods by Sea Act 46 U.S.C. § 1304(5) (West 1975) ..... *passim*
(3) 28 U.S.C. 1254(1) (West 1966) 2
(4) 1968 Brussels Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to BILLS OF LADING 7
(5) Sup. Ct. R. 17 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-261

BINLADEN BSB LANDSCAPING,

Petitioner,

—against—

M.V. "NEDLLOYD ROTTERDAM", her engines, boilers, etc., NEDLLOYD LIJNEN B.V. (NEDLLOYD LINES),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Nedlloyd Lijnen B.V. (hereinafter referred to as "Nedlloyd") respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing with a suggestion that the action be reheard *en banc* is reproduced at Appendix 20A of the Petition. The opinion of the United

States Court of Appeals for the Second Circuit reversing the judgment of the United States District Court for the Southern District of New York and remanding the case for additional findings of fact is reproduced at Appendix 1A through 19A of the Petition. That opinion is officially reported at 759 F.2d 1006 (2d Cir. 1985). The opinion of the United States District Court for the Southern District of New York is reproduced at Appendix 21A through 29A of the Petition. That opinion is officially reported at 593 F. Supp. 546 (S.D.N.Y. 1984).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Petition for a Writ of Certiorari is timely in light of the order of the United States Court of Appeals for the Second Circuit, dated May 16, 1985, denying the petition for rehearing with a suggestion that the action be reheard *en banc*.

STATEMENT OF THE CASE

Petitioner's statement is inaccurate and incomplete. However, only facts bearing on the issue before the Court require clarification. It is sufficient to note that in June, 1980 Petitioner, Binladen BSB Landscaping (hereinafter referred to as "Binladen"), as shipper and consignee, and Nedlloyd, as vessel-owning ocean carrier, contracted for the carriage of ten refrigerated marine cargo containers loaded with live plants from two ports in the United States to one port in Saudi Arabia. The contents of two of the containers were damaged on receipt in Saudi Arabia. As a result, Binladen's underwriters commenced this maritime action to recover $80,322.00 for breach of contract.

After a bench trial, the District Court held Nedlloyd liable for the damage to the live plant cargo and rejected Nedlloyd's argument that the $500. per package limitation on an ocean carrier's liability provided for in the United States Carriage of

Goods by Sea Act, 46 U.S.C. § 1304(5) (West 1975) (hereinafter referred to as "COGSA"),[1] operated to restrict Nedlloyd's liability to $500. per container. Nedlloyd confined its appeal to the argument that the District Court improperly awarded damages in excess of those permitted by COGSA. The Court of Appeals reversed the District Court and remanded the case for additional findings of fact.

The Court of Appeals, in conformity with well-established precedent, examined the express contractual agreement between the parties embodied in the bill of lading to determine the proper application of the COGSA "per package" limitation of liability. Recognizing that this case raised an issue which had been expressly left unresolved in prior decisions, the Court of Appeals held, establishing a clear rule, that ". . .when the bill of lading does not clearly indicate an alternative number of packages, the container must be treated as the COGSA package if it is listed as a package on the bill of lading and if the parties have not specified that the shipment is one of 'goods not shipped in packages.' " 759 F.2d at 1016 (Appendix 16A through 17A of the Petition).[2] However, the Court of Appeals allowed the new rule to apply prospectively only, to bills of lading prepared after the date of the decision; the rule was not applied to Petitioner, Binladen. Instead, the Court of Appeals considered the cargo in question to be "goods not shipped in packages," thus limiting Nedlloyd's liability to $500. "per customary freight unit", and remanded to the District Court for findings of fact regarding the customary freight unit for the shipment. To date there have been no further proceedings in the District Court and this issue remains unresolved.

---

1 Section 1304(5) of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5) (West 1975) is reproduced at Appendix 36A through 37A of the Petition.

2 The shipper, Binladen, supplied the description of the container's contents appearing on the bill of lading as is customarily the case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Respondent Nedlloyd respectfully submits that the "special and important reasons" which justify the granting of a writ of certiorari (Sup. Ct. R. 17) are not present in this case.

I

PETITIONER LACKS STANDING TO SEEK REVIEW OF THE QUESTIONS PRESENTED IN THE PETITION

Petitioner essentially seeks to have this Court re-examine the rule created by the Court of Appeals that a container will be considered a COGSA "package" if it is identified on the bill of lading as a package, the bill of lading does not clearly indicate an alternative number of packages and the parties have not agreed that the shipment is comprised of "goods not shipped in packages." However, the Court of Appeals decided that the rule would have prospective application only and did not utilize it in this case. Therefore, Petitioner has not been affected by the rule it seeks to have this Court review.

A party seeking relief must have a personal stake in the outcome of an issue to assure the "concrete adverseness" which hones presentation of a question. *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *see*, *Stanton v. Stanton*, 421 U.S. 7, 12 (1975). Thus if the litigant is unable to show that a favorable decision will accrue to its benefit, standing to raise the issue is lacking. *See, Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). Because Petitioner seeks review of a rule which was given prospective vitality only, it would not reap the benefits of a favorable decision in this Court and consequently lacks standing to challenge the Court of Appeals decision on this ground.[3]

---

3 Petitioner's argument that the Court of Appeals applied the prospective rule of this case to Binladen reflects a misunderstanding of the

This Court considered principles of standing in a comparable context in *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). There appellant contended that the Court of Appeals decision appealed from was ambiguous but was intended to create a rule with prospective application only. Appellant urged this Court to adopt this interpretation of the decision, leaving intact a favorable District Court decision. In rejecting this argument and finding that the Court of Appeals intended to resolve the case against appellant this Court noted, "[a]ppellant [name] never sought clarification from the Court of Appeals on the scope of its decision, and apparently regarded the court's judgment to be sufficiently adverse and binding on him to warrant seeking review on the merits before this Court." 450 U.S. at 462 n. 10. The logical corollary to this statement is that where the ruling of a lower Court is given prospective application only, the disappointed litigant may not seek review in this Court because the decision is not sufficiently adverse and binding on it. Falling within this class, Petitioner lacks standing to seek review of the issue(s) presented in the Petition.

---

decision. (Point B, pages 20 through 23 of the Petition). The Court found that because the plants comprising the shipment were not described on the bills of lading as packaged, they did not constitute COGSA "packages" although, if properly described, some of them might have warranted treatment as COGSA "packages". 759 F.2d at 1014 (Appendix 13A of the Petition). Parenthetically, the District Court's finding that each plant was individually treated in preparation for the carriage was rejected by the Court of Appeals as "clearly erroneous" 759 F.2d at 1014 n.9 (Appendix 14A of the Petition). Armed with this conclusion, the Court of Appeals articulated the rule in question, which, had it been applied to Binladen, would have resulted in Nedlloyd's liability being limited to $500. per container (the COGSA "package") and the Court of Appeals ordering that judgment be entered accordingly. Instead of applying the rule however, the Court of Appeals instructed that the shipment be treated as one of "goods not shipped in packages", remanding to the District Court for a determination of the "customary freight unit".

II

THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR WITH DECISIONS OF THE COURTS OF APPEAL FOR THE FIFTH, NINTH OR ELEVENTH CIRCUITS

Although Petitioner argues that the decision of the Court of Appeals below conflicts with a decision of this Court and with decisions of other courts of appeal, the comparisons drawn are illusory and in fact are undercut by recent authority.

Petitioner relies on *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), apparently to contend that a rule treating a container as a "package" within the meaning of COGSA section 1304(5) conflicts with this Court's statements. In *Caputo* this Court construed the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, which were intended to extend the Act's coverage to a larger geographical area for specific types of workers, to encompass a worker injured while unloading a container. This Court found that the advent of containerization permitted traditional cargo loading and unloading operations to move shoreward making the container a modern substitute for the hold of a ship and concluded that the injured worker was within the scope of the amendments. 432 U.S. at 269-71. The *Caputo* decision simply has no bearing on the definition of the term "package" in the context of COGSA and the law developed in connection with contracts of ocean carriage represented by bills of lading.[4]

---

4 The Court of Appeals for the Second Circuit has expressly recognized that a container is "functionally a part of the ship", *Leather's Best, Inc. v. S.S. MORMACLYNX*, 451 F.2d 800, 815 (2d Cir. 1971) in a line of cases actually construing the "per package" limitation contained in section 1304(5) of COGSA. *See, Mitsui & Co., Ltd. v. American Export Lines*, 636 F.2d 807, 816 (2d Cir. 1981) (citing *Caputo*). In fact, the decision of the Court of Appeals below expressly considered the widely accepted proposition that a container is the modern extension of a vessel. (Appendix 10A through 11A of the

The correctness of the Second Circuit's reasoning in this case is evidenced by the decision in *Hayes-Leger Associates, Inc. v. M/V ORIENTAL KNIGHT*, 765 F.2d 1076 (11th Cir. 1985) where the Court of Appeals for the Eleventh Circuit expressly adopted the Second Circuit's rule. The Eleventh Circuit concluded that the Second Circuit's decision supplied a reasonable method of applying section 1304(5) of COGSA, comported with the 1968 Brussels Protocol[5] and provided certainty for the maritime industry. 765 F.2d at 1080. In addition, the Court in *Hayes-Leger* noted that adopting the rule promoted uniformity among the circuits. *See, id.* Thus the purported conflict between this case and decisions of the Court of Appeals for the Eleventh Circuit is nonexistent.

The assertion that the Fifth Circuit's decision in *Allstate Insurance Co. v. Inversiones Navieras Imparca, C.A.*, 646 F.2d 169 (5th Cir. 1981) conflicts with the Second Circuit's decision in this case is fallacious. In *Inversiones Navieras* the Fifth

---

Petition). Therefore, to the extent that the discussion *Caputo* is instructive in applying section 1304(5) of COGSA, it has long been a component of the "per package" limitation analysis developed in the Second Circuit.

5 The 1968 Brussels Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to BILLS OF LADING provides in pertinent part:

"Article 2

. . .

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit."

The rule established by the Second Circuit in this case comports with this international convention; where the bill of lading does not reflect the number of packages, each "article of transport" (i.e. container) shall be deemed the package or unit. *Mitsui & Co., Ltd. v. American Export Lines*, 636 F.2d 807, 821 (2d Cir. 1981). Thus the decision promotes international uniformity.

Circuit held that a container would not be considered a COGSA "package" where the goods in question were placed in packages (cartons in that case) and the number of such packages was disclosed to the carrier on the bill of lading or otherwise. 646 F.2d at 172-73. In that scenario each individual package within the container was determined to be the COGSA "package". Thus the Fifth Circuit in *Inversiones Navieras* did not consider a case where the bill of lading specified the number of containers but did not reveal the number of packages inside, the factual context of the Second Circuit's decision in this case.[6]

The decision of the Court of Appeals for the Ninth Circuit in *Hartford Fire Insurance Co. v. Pacific Far East Line, Inc.*, 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974) similarly addressed a different issue and thus does not conflict with the Second Circuit's decision. *Hartford* concerned the carriage of one large unboxed electrical transformer fastened to a skid; no container was involved in the movement and the Court of Appeals was not called on to construe a bill of lading contract. The Ninth Circuit held that merely attaching the transformer to the skid did not create one COGSA "package", instead the transformer was not shipped in a "package", implicating the "per customary freight unit" limitation of liability contained in section 1304(5) of COGSA. Thus *Hart-*

---

6 The Fifth Circuit's decision in *Inversiones Navieras* is in complete harmony with Second Circuit decisions generated by analogous facts. *Compare, Inversiones Navieras*, 646 F.2d 169 (5th Cir. 1981) *with, Smythgreyhound v. M/V EURYGENES*, 666 F.2d 746 (2d Cir. 1981) *and, Mitsui & Co., Ltd. v. American Export Lines*, 636 F.2d 807 (2d Cir. 1981). In both *Smythgreyhound* and *Mitsui* the relevant bills of lading disclosed the contents of the containers in terms of separate packages. In addition, because the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981, *see, Hayes-Leger*, 765 F.2d 1076 at 1079 n.6, the *Inversiones Navieras* decision was the law of the Circuit when *Hayes-Leger* was decided.

ford is factually and legally distinguishable from the Second Circuit's decision.[7]

The decision of the Court of Appeals in this case is not in conflict with decisions of this Court or with decisions of the Courts of Appeal for the Eleventh, Fifth or Ninth Circuits. Moreover, the rule formulated in the decision has been adopted by the Court of Appeals for the Eleventh Circuit.

III

THE DECISION OF THE COURT BELOW IS CORRECT AND IN ACCORD WITH ITS PRIOR DECISIONS

The Second Circuit's decision provides a reasonable rule for a limited category of cases which that Court had expressly declined to address in prior cases not properly raising the issue. In addressing the COGSA "per package" limitation of an ocean carrier's exposure, the Second Circuit developed, and now uniformly applies, the doctrine that the touchstone of the inquiry is an analysis of the parties intent manifested in the bill of lading contract. *See, e.g., Allied Int'l American Eagle Trading Corp. v. S.S. YANG MING*, 672 F.2d 1055 (2d Cir. 1982); *Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gessellschaft*, 375 F.2d 943, 946 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). Applying this overarching principle, the Second Circuit has held that where the bill of lading discloses the number of containers and the number of items qualifying as packages loaded inside, the container will not be the COGSA "package". *Mitsui & Co., Ltd. v. American Export Lines*, 636 F.2d 807 (2d Cir. 1981); *see, Smythgrey-*

---

7 Insofar as Petitioner suggests that the Second Circuit's decision conflicts with the definition of a "package" the Ninth Circuit adopted from Black's Law Dictionary in *Hartford* (page 8 of the Petition), the Second Circuit recognized that "[t]his definition confirms our intuition about what a package is, but it does little to establish a satisfying legal standard." *Allied Int'l American Eagle Trading Corp. v. S.S. YANG MING*, 672 F.2d 1055, 1057 (2d Cir. 1982).

hound v. M/V EURYGENES, 666 F.2d 746 (2d Cir. 1981) (applying the *Mitsui* decision). Where a container is loaded with unpackaged goods which, absent a container, would have been shipped in a crate of comparable size and the shipping documents provide the carrier with no information regarding the number of units within the container, the container has been held to be the COGSA "package". *Rosenbruch v. American Export Isbrandtsen Lines, Inc.*, 543 F.2d 967 (2d Cir.), *cert. denied*, 429 U.S. 939 (1976). Where the bill of lading contains no agreement regarding packaging of a containerized cargo and describes the goods as not separately packaged, the carrier's limitation of liability is applied "per customary freight unit" for "goods not shipped in packages." *Watermill Export, Inc. v. M.V. PONCE*, 506 F. Supp. 612 (S.D.N.Y. 1981). However, the Court heretofore refrained from ruling on the treatment to be accorded situations where the bill of lading fails to disclose the number of alternative "packages" within a container. *Mitsui*, 636 F.2d at 821 n.18 ("Nothing said here, of course, covers the situation in which the bill of lading does not show how many separate packages or units there are."); *Smythgreyhound*, 666 F.2d at 752 n.16 ("*Mitsui* did not cover the situation in which the bill of lading does not show how many separate packages there are.").

The instant case arose in a factual context squarely presenting the issue left unresolved in prior cases. The rule created by the Second Circuit merely completes the logical analysis developed to address COGSA "per package" limitation issues.

IV

THE QUESTION(S) PETITIONER RAISES DO NOT MERIT REVIEW

The issue(s) raised in the present case are too narrow to warrant review by this Court on certiorari. The rule articulated by the Court of Appeals for the Second Circuit applies to the rare case where the bill of lading contract lists a container as a package and does not provide an alternative number of packages and the parties have not specified that the shipment is comprised of "goods not shipped in packages'. This confluence of factors is unusual[8] and unlikely to recur with regularity. In fact, the vast majority of containerized ocean carriages involve shipments composed of several smaller COGSA "packages". In order to avoid application of the rule created in this case a shipper merely has to disclose the number of component packages to the ocean carrier, thus implicating the holdings of the *Mitsui*, 636 F.2d 807 (2d Cir. 1981) and the *Smythgreyhound*, 666 F.2d 746 (2d Cir. 1981) cases.

In addition, this Court should not exercise its discretion to review one aspect of the impact of containerization on section 1304(5) of COGSA because the law in this area is still evolving and unsettled. Issues arising under section 1304(5) of COGSA must be resolved with reference to the particular facts of a case, the section eludes construction as a straightforward matter of law. Finally, resolution of the question(s) Petitioner raises will entail redefining the language of COGSA, a duty appropriately left to Congress.

---

8 The singularity of this factual matrix is evidenced by the fact that the issue it engenders remained unresolved from the date of the Second Circuit's decision in *Mitsui* (January 16, 1981) through the date of the decision in question (April 3, 1985).

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD H. SOMMER
Counsel of Record

KIRLIN, CAMPBELL & KEATING
14 Wall Street
New York, New York 10005
(212) 732-5520

Attorneys for Respondent

J. SCOT PROVAN
ARTHUR E. HOFFMANN, JR.
Of Counsel

APPENDIX A

Subsidiaries

Shipping
KHL-Lijnen B.V., Rotterdam
KNSM-Kroonburgh B.V., Rotterdam
KNSM-Lijnen B.V., Rotterdam.

Nedlloyd (Singapore) Pte. Ltd., Singapore

Nedlloyd Bulk (België) N.V., Antwerpen
Nedlloyd Shipbrokers Ltd., Londen
Nedlloyd Bulkchem B.V., Rotterdam
Nedlloyd Fleet Services (HK) Ltd., Hongkong
Nedlloyd Group (Antilles) N.V., Willemstad
Nedlloyd Lines (Antilles) N.V., Willemstad
Nieuwe Kustvaart Maatschappij B.V., Amsterdam

Noordzee Veerdiensten B.V., Europoort

Exploitation of Drilling Units
Nedlloyd Inc., Houston

Mammoet Transport
Mammoet Liner Services B.V., Amsterdam
Mammoet Shipping B.V., Amsterdam
Mammoet Stoof B.V., Breda

Rhine and Inland Shipping
Nedlloyd Rijn- en Binnenvaart B.V., Rotterdam

Shipping Agencies
Holland West-Afrika Lijn B.V., Tema

Nedlloyd KK (Agency), Tokio
Nedlloyd KK, Kobe
Nedlloyd KK, Nagoya
Nedlloyd KK, Osaka
Nedlloyd KK, Yokohama
Nedlloyd (HK) Ltd., Hong Kong
Nedlloyd-EAC Agencies Pte. Ltd., Singapore

Nedlloyd Agencies SA (Pty) Ltd., Durban
Nedlloyd Agencies SA (Pty) Ltd., Cape Town
Nedlloyd Agencies SA (Pty) Ltd., East London
Nedlloyd Agencies SA (Pty) Ltd., Johannesburg
Nedlloyd Agencies SA (Pty) Ltd., Port Elizabeth

Nedlloyd Inc., New York
Transpacific Transportation Company, San Francisco
Transpacific Transportation Company, Los Angeles
Transpacific Transportation Company, Portland
Transpacific Transportation Company Ltd., Vancouver

Kronschiff Schiffsagenturen GmbH, Duisburg
H. Oehl AG, Basel
Plate-Ruys & Cie S.A., Le Havre
Raffin & Cie S.A., Dunkirk
Reedereikontor Günther Preuss GmbH, Düsseldorf
H. C. Röver GmbH, Hamburg
Ruys & Co. B.V. (The Netherlands), Rotterdam

Ruys & Co. N.V. (Belgium), Antwerp
Ruys & Co. S.A., Paris
Ruys & Co. S.A. (France), Marseilles

Stevedoring/Warehousing
Combined Terminals Amsterdam v.o.f., Amsterdam
Havenbedrijf Kroonvlag Rotterdam B.V., Rotterdam
Aug. de Meyer B.V., Terneuzen
B.V. Stevedore Company 'Quick Dispatch', Rotterdam
Uniterminal B.V., Rotterdam

Offshore Supply
Damco Offshore B.V., Amsterdam
Damco Offshore Ltd., Aberdeen
Damco Offshore (Texas) Inc., Houston

General Trucking and International Forwarding
C.R. Armfield (Hull) Ltd., Hull
Aveka S.à.r.l., Strassbourg
Damco Baltimore Inc., Baltimore
Damco Boston Inc., Boston
Damco Charleston Inc., Charleston
Damco Forwarding N.V., Antwerp
Damco-Fritz Rieder Spedition GmbH, Berlin
Damco-Fritz Rieder Spedition GmbH, Nürnberg
Damco International (France) S.A., Paris
Damco International Forwarders Ltd., Barking

Damco International Transportation & Distribution Inc., New Yc
Damco Internationale Spedition GmbH, Nürnberg
Damco Transport Nederland B.V., Rotterdam
Damco Spedizioni Internazionali, Genoa
Damco-van Swieten B.V., Amsterdam
Damco-van Swieten B.V., Rotterdam
Frans Hoynck's Scheepvaartkantoor B.V., Amsterdam
Intermodal Transports B.V., Amsterdam
Karl Schroers Speditions- und Schiffahrts GmbH, Duisburg
Van Swieten B.V., Amsterdam

Specialised Trucking and International Forwarding
Braakman Autovervoer B.V., Oosterhout
Damco Creten Transport N.V., Merksem (Antwerp)
Damco GG Transport B.V., Rotterdam
E.I.C. Nederland B.V., Drachten
'Ereska' Internationale Spedition- und Transportgesellschaft mbH, Nettetal
J.P. Janssen B.V., Venlo
J.P. Janssen GmbH, Nettetal
N.V. J.P. Janssen S.A., Ternat
RSK Internationale Expeditie- en Vervoer-onderneming B.V., Amsterdam
Reym Tanktransport (Reym Charters) B.V., Veendam
Ruys Auto Transport (Ruys & Co.), Antwerp
Schenker & Co's Internationale Expeditie B.V., Nijmegen/Rotterdam

Airfreight Forwarding
Aeronaut B.V., Amsterdam Airport
Chartair Europe B.V., Amsterdam Airport
Chairtair U.K., Heathrow.
Damco Air B.V., Amsterdam Airport
Damco Air, Zaventem
Damco Air S.A., Charles de Gaulle Airport, Roissy
Damco Air Spedition GmbH, Frankfurt/Main
Damco Distribution International and Servicing B.V., Amsterdam Airport
Damco Expres B.V., Amsterdam Airport
Damco International Transport (HK) Ltd., Hong Kong
Damco International Transport (Singapore) Pte. Ltd., Singapore
General Freight Handling B.V., Amsterdam Airport

Trade and Industries
Autocenter Borghstijn B.V., Rotterdam
Autocenter Van Gorp Dordrecht B.V., Dordrecht
Autocenter Van Gorp Rotterdam B.V., Rotterdam
Autocenter Pietersen Rotterdam B.V., Rotterdam